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THE NATIONAL PRODUCTIVITY AND INNOVATION ACT AND RELATED LEGISLATION

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

FIRST AND SECOND SESSIONS

ON

S. 1841

A BILL TO PROMOTE RESEARCH AND DEVELOPMENT, ENCOURAGE INNOVATION, STIMULATE TRADE, AND MAKE NECESSARY AND APPROPRIATE AMENDMENTS TO THE ANTITRUST, PATENT, AND COPYRIGHT LAWS

AND ON

S. 568, S. 737, and S. 1383

JUNE 29, OCTOBER 26, 1983, AND MARCH 12, 1984

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THE NATIONAL PRODUCTIVITY AND INNOVATION ACT AND RELATED LEGISLATION

WEDNESDAY, JUNE 29, 1983

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 9:40 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Present: Senators Thurmond, Mathias, Metzenbaum, Specter, Dole, and Biden.

Staff present: W. Stephen Cannon, chief antitrust counsel; Sara S. Rogers, senior counsel; Jack Dent, committee staff; Debbie Shupe, committee staff; and Joseph Gibson, committee staff.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The CHAIRMAN. The committee will come to order.

Today the committee begins hearings on legislation addressing the antitrust implications of research and development joint ventures. There is wide interest in this subject, and it is the duty of this committee to explore it fully.

While S. 568, S. 737, and S. 1383 differ somewhat in approach, they have a common goal: Clarification of when the antitrust laws apply to research and development joint ventures.

Proponents of these bills argue that our Federal antitrust laws currently inhibit joint research and development, and thus contribute to the decline in international competitiveness of the United States in many product markets.

Critics of the legislation say that the perception that our antitrust laws are to blame for this decline is erroneous and that no change is needed.

As these hearings begin, I know that I need remind no one that legislation which creates even a limited, narrow exemption from our antitrust laws must be carefully scrutinized. Exemptions should be granted sparingly and only for the most compelling reasons, lest we end up with laws of limited application and questionable force. In short, the proponents of this legislation must present a convincing case.

We have assembled an impressive array of witnesses this morning, and it is a particular privilege to welcome the distinguished Secretary of Commerce. I look forward to hearing the testimony of him and all of our other witnesses.

Mr. Secretary, you may proceed.

STATEMENT OF HON. MALCOLM BALDRIGE, SECRETARY OF COMMERCE, U.S. DEPARTMENT OF COMMERCE, WASHINGTON, D.C.

Secretary BALDRIGE. Thank you very much, Mr. Chairman. I would like to ask that you enter my statement in the record, and I will just read a shorter version, if I may.

The CHAIRMAN. If you would just like to place your entire statement in the record and then in your own words briefly summarize, feel free to do that.

Secretary BALDRIGE. Thank you.

Mr. Chairman and members of the committee, thank you for this opportunity to express my views on S. 568, S. 737, and S. 1383, three bills dealing with joint research and development and the antitrust laws.

I want to state right away I agree fully with the general aim of these three bills. We need to change our antitrust laws to encourage more joint research and development as recognized by these three bills.

Joint research and development programs are procompetitive. They reduce duplication, promote the efficient use of scarce technical personnel, and help to achieve desirable economies of scale.

Small firms are able to collaborate in joint research and development projects which because of prohibitive costs they could not do so by themselves.

Large firms are jointly able to tackle today's large and complex technological problems, which are often beyond the ability of single firms.

Our major trading partners have focused collaborative efforts on research and development in high technology industries. Through permissible arrangements under their antitrust laws, these countries and the European Economic Community have targeted for intensive joint research and development certain high tech industries where the United States has a technological lead.

It is essential to our long-term economic well-being that U.S. industries have the same opportunities to engage in joint research and development as our competitors. U.S. firms, however, have consistently expressed the view that they are handicapped in competing in international markets because our antitrust laws inhibit joint research and development.

U.S. firms say they are hesitant to invest heavily in joint research and development projects because of the high risk of treble damages and criminal sanctions under existing antitrust law.

The high risk perceived by U.S. companies in conducting joint research and development has persisted despite the Department of Justice antitrust guide concerning research joint ventures, which attempts to clarify how the antitrust laws apply to a given set of facts.

Guidelines, by their nature, have to be somewhat ambiguous to allow room for flexibility of enforcement policies which can vary from one administration to the next. The business review procedure of the Department of Justice also has not dispelled industry's fears in this area. These procedures provide that upon a request setting forth proposed business conduct, the Department of Justice may issue a letter stating its present enforcement intention, but it does not shield the venture from future Department of Justice challenge.

The letter is not binding on the courts in private suits, and there is no assurance that the enforcement policies stated therein will not change from one administration to the other.

Mr. Chairman, the risk of treble damage liability has inhibited collaborative R&D and has placed U.S. industry at a disadvantage in the international marketplace. I am pleased that both the administration and members of Congress are in agreement as to the need to change our antitrust laws to address this problem.

So far, during the 98th Congress, five legislative proposals have been introduced, three of which are the subject of these hearings. I would like to comment briefly on some of the provisions of the three bills that are being considered at this hearing.

First is the approval of the Attorney General. Both S. 568 and S. 1383 require the Attorney General to approve the joint research and development venture. S. 737 does not. Formal approval by the Attorney General assigns the Department of Justice a regulatory role inconsistent with its role of enforcing the antitrust laws.

The approach of S. 737 is more desirable as it provides only the enforcement role for the Attorney General.

Second, protection from antitrust laws: For joint R&D ventures and their participants, all three bills would preclude criminal and treble damage liability. They would also allow Government suits for injunctions and suits for actual damages by private individuals.

I believe, however, that the desirable approach is to eliminate all private antitrust actions against joint R&D and all Government damage actions. The Government could, however, seek an injunction against any activity that it determines to be harmful to competition.

Third, conditions for conducting joint R&D ventures: Both S. 568 and S. 737 require joint R&D ventures to comply with several conditions before they are entitled to protection from the antitrust laws. S. 1383 does not place any conditions on the joint R&D venture.

The conditions set out in S. 568 and S. 737 include restrictions on the length of the programs, the way they are organized, who should be eligible participants, and the licensing of resultant patents. The listing of conditions for joint R&D ventures is contrary to the cornerstone of this administration's policy to minimize Government intervention in the marketplace.

All that should be necessary is the notification of the Attorney General identifying the participants of a joint venture and a description of the R&D to be undertaken, accompanied by any agreements between the participants. I am pleased to say that these three elements are included in the R&D section of an antitrust reform package under review within the administration.

This package would exempt joint R&D from all private antitrust actions and all Government actions for damages under the antitrust laws based on conduct that is part of a research and development program that has been disclosed to the Government.

The Government, however, could seek an injunction to halt any actions by the joint venture thought to be harmful to competition.

The proposal being considered by the administration thus avoids any Federal interference as to how the joint R&D venture will be conducted. Further, as only notification of the joint venture to the Government is required, the paperwork burden on the private sector and the Federal Government is minimal.

In addition to the new R&D section, the bill being considered by the administration will include four additional reforms in the antitrust laws which are of equal importance. These additional reforms are a section which would eliminate treble damages for non per se antitrust violations, a section assuring that intellectual property licensing under the antitrust law is a non per se offense, a section dealing with patent and copyright misuse, and a section dealing with process patents.

Mr. Chairman, this concludes my testimony, and I will be pleased to answer any questions.

The CHAIRMAN. Mr. Secretary, if I understand your testimony correctly, you feel that private treble damage actions are the primary antitrust impediment to joint ventures.

However, it appears to me that while the administration's proposal addresses that issue, it does not address the issue of injecting more certainty into the law as to whether a joint venture constitutes an antitrust violation. The Justice Department would continue to make that determination using traditional antitrust analysis rather than utilizing the various statutory criteria contained in these bills.

As such, do you think that the administration's proposal will be criticized because it arguably does little to provide more certainty and guidance as to when a joint venture will be challenged as unlawful under the antitrust laws?

Secretary BALDRIGE. Well, Mr. Chairman, let me emphasize that S. 568 and S. 737 and the administration's proposal do not change the antitrust laws with respect to competition. In this respect, both the Sherman and the Clayton Acts remain in force. What has changed is the penalty for violating these laws.

In addition, a joint venture can be halted at any time if the Government finds it harmful to competition. And neither of these two bills we talked about nor the administration's proposal changes the antitrust laws' impact on the development of new products or marketing strategies or the sale of new products.

All illegal marketing activities, such as price fixing, would continue to feel the full weight of the antitrust laws. It is our view that the listing of conditions is contrary to the policy of this administration to minimize Government intervention in the marketplace.

The CHAIRMAN. Mr. Secretary, you point out that a number of our major trading partners have used successful joint research and development ventures and narrowed the technological lead of the United States in many areas.

While I understand that you feel our antitrust laws have been a major factor in our inability to maintain a wide lead, are there other factors involved?

Secretary BALDRIGE. Well, we are facing increasingly difficult competition around the world, Mr. Chairman; the Japanese, West Germans, the European Community as a whole have adopted substantially more permissive regulatory standards than we use in this country. They have adopted the broad rule of reason analysis.

They allow mergers when they result in improvements in the competitive positions and that such improvements will outweigh the detrimental effects of market domination. So, they go further than we do.

The Japanese have softened their antitrust laws through the passage of numerous exemptions. In all these countries enterprises can undertake joint actions that will make them more competitive abroad without the limitation from their own antitrust laws.

And the problem in this country is that our industry really has a fear of what they will run into; they do not get any prior satisfaction that they will not get sued. It has been a hindrance, a major hindrance, in our opinion.

The **CHAIRMAN**. The distinguished Senator from Ohio.

Senator **METZENBAUM**. Mr. Baldrige, do I understand your bill would eliminate treble damages for all non per se antitrust violations having nothing at all to do with R&D?

Secretary **BALDRIGE**. We would exempt joint R&D from all private antitrust actions and all Government actions for damages under the antitrust laws based on conduct that is part of an R&D program.

Senator **METZENBAUM**. You missed my question. I do not mean to interrupt you, but I do not think you understood my question.

On page 8 you say the following: "In addition to the new R&D section, the proposal under review in the administration contains four additional reforms in the antitrust laws which are of equal importance."

And then you say, "A section which would eliminate treble damages for non per se antitrust violations."

My question, therefore, is: Is your testimony this morning and the thrust of the administration's proposal to the point that all non per se antitrust violations would no longer be subject to treble damage action?

Secretary **BALDRIGE**. Well, the answer to your question is yes, Senator. And I believe Mr. Baxter from the Justice Department is going to cover that in his testimony.

Senator **METZENBAUM**. So, that actually this hearing this morning has now been broadened to the point where the administration is appearing and suggesting probably the most drastic change in the antitrust laws of our country that anybody—any administration has probably proposed, Republican or Democrat, maybe since the enactment of the original laws. I do not see any other way to interpret that because that is far more draconian than the question of joint R&D undertaking. And I just was wondering why. What suddenly happened to cause the administration to be prepared to decimate the antitrust laws of this country in this manner?

Secretary **BALDRIGE**. Well, we think it is necessary, Senator, if we are going to keep our lead and in some cases regain it in the international market.

Now, that means jobs for Americans. Every time I look at the antitrust laws—and I have great respect for them—but they were passed at a time when the domestic market in the United States was the predominant factor. The body of law has grown up around that factor. It has not been until the very recent past that we have seen other countries' research and development programs begin to outstrip ours in the United States.

Of course, we now have in the United States a reasonable portion of the scientists and engineers in the world. But I think it is important to note that perhaps 90 percent of all the engineers and scientists who have ever lived are living today. And we do not have more than a reasonable share of them. That means that unless we are able to marshal our forces, we are going to lose out to foreign competition this is going to mean a loss of American jobs.

It is no longer a domestic problem; it is a global problem.

Senator METZENBAUM. But my—so that you understand—I understand your point with respect to joint R&D, but I am talking about something other than R&D. You are saying that all non per se antitrust violations shall not be subjected to treble damage actions. And you are saying that we have to do this by reason of jobs. I am saying that I always thought that this administration stood for free enterprise, that this administration believed that small business people ought to have a chance to grow and develop; that they ought not to be squeezed out by companies joining together or companies using their economic power to squeeze them out; and that they had the protection of the antitrust laws of our country.

Now, to me, it is a question of basic competition in our Nation. And what I am asking you is: Why? It has nothing at all to do with foreign competition because we could be talking about two candy manufacturers joining together to squeeze out or to have fixed prices, maintained prices, or to do a number of other things.

And what I am asking you is: Why has the administration gone to the point of deciding to decimate the antitrust laws generally, excluding the R&D thing, because I am staying away from R&D at this moment. I will get to that in time.

Secretary BALDRIGE. Well, I would like to make this point, Senator: I do not believe that you can say, as in the example of the two candy manufacturers, that we are talking about areas where there would be solely domestic competition.

Whether a company exports or not is really just part of the overall problem. Almost any product made in this country is facing competition from imports from abroad. I know of very few products where there is not that kind of competition. It is getting more and more severe across the board.

Now, having said that, I think on the specific non per se points that you brought up, Mr. Baxter is going to address those. He has the advantage over me in this regard of being an expert in the antitrust laws. When you talk about the decimation of the antitrust laws, as a layman, it does not look like this would decimate them. But I would rather have Mr. Baxter with his background address that point.

Senator METZENBAUM. Mr. Chairman, I think I have other questions, but in view of the fact there is a rollcall——

The CHAIRMAN. You can go ahead until the 5 minute bell.

Senator METZENBAUM. With respect to the R&D joint ventures, do you not see the problem of clarification as to when the Government would or would not permit such a joint undertaking? And how would you handle that as a practical matter?

Secretary **Baldrige**. Well, what we are trying to work toward, in the administration bill, is to just allow joint R&D ventures.

Senator **Metzenbaum**. I am sorry; I did not hear you.

Secretary **Baldrige**. What we are working toward in the administration bill would be to allow joint R&D ventures as long as the Government was notified, the participants were made known, and their plans were indicated.

Now, that would mean they could go ahead and do it. If the Government, however, thought that the joint venture was going to have any anticompetitive effects outside the R&D area, it could seek an injunction. But companies would be free to unite on research and development without the fear of treble damages or private or government suits.

They would be stopped by injunction if there is any possibility of wrongdoing.

Senator **Metzenbaum**. Do you think that the problems of determining what is R&D and when the development begins and whether it is part of the marketing process, that you cannot develop a product until you market? We had the drug people here the other day telling us how much they spend on marketing and pretesting, et cetera.

Are you not concerned that in providing an exemption without any prescreening that you will just make such a gaping hole in the antitrust laws that there will be very little left as far as any validity is concerned?

Secretary **Baldrige**. Not if the exemption is confined solely to research and development, Senator; research and development is something that should benefit competition, not restrain it. If the law clearly narrows this to R&D, we do not see any problems with it.

There are ways that—of course, any effort like this could spill over into marketing. If that happened, the full force of the antitrust laws would be there for those aggrieved to take advantage of.

Senator **Metzenbaum**. Let us assume that one of the automobile manufacturers comes up with a very sophisticated new device to get additional gas mileage, and decides that they want to just confine its availability to Ford and General Motors for the purpose of testing it as a part of the development project, and that they are only going to test it for a period of 2 or 3 years before they make it available to all other cars that they manufacture or anybody else who might want to use it, which under the present laws would very possibly be subject only to patent laws. This might provide some legal problems for them, if they sat down and came to that agreement.

Secretary **Baldrige**. If the government thought that such actions could lead to any anticompetitive actions or was bordering on that, they could use the injunctive process.

Senator **Metzenbaum**. Yes, but now, what if Chrysler thought it was leading to an illegal problem, creating an unfair competitive situation for them and they would be denied any right to go into court at all, wouldn't they, under your proposal?

Secretary **Baldrige**. Yes. They would have to depend on the injunctive process. They could come to the Government and explain.

Senator **Metzenbaum**. And if the Government did not want to do anything, they would have no rights.

Secretary **Baldrige**. That is correct, as I understand it. They would have to depend on the injunctive process. In any change like this, there are probably some inherent risks. I think one has to weigh these risks against the advantages. That is what our competitors do. In effect, we are relying on an injunctive process and in your case Chrysler being able to convince the antitrust department that they had a valid case.

And so they certainly would have their day in court as it were. The advantages are that it would put U.S. industry in the same position as their competitors in Japan and Europe, and so forth, because they enjoy this particular ability now.

Senator **Metzenbaum**. Well, I will not belabor the point. Based upon the actions up to now of the antitrust division of this administration, I think Chrysler could file a petition for bankruptcy as of that moment because I do not think they would get much relief from the antitrust of this administration; at least their record would not seem to indicate that.

Mr. Chairman, I have no further questions.

The **Chairman**. We will have to take a few minute recess until Senator Mathias returns, and then I will ask him to chair the hearing. So we had better go and vote and then you can come back.

[The committee stood in recess from 10:09 to 10:15 a.m.]

Senator **Mathias** [presiding]. Mr. Secretary, I was tempted to try to intervene a moment ago when the Senator from Ohio, Mr. Metzenbaum, said that this was the first time that there had ever been an attempt to breach antitrust in this manner.

As a matter of fact, this is a subject that has been under consideration for many years. Two very good friends of mine, the late Glenn Beall, Senator from Maryland, Glenn Beall, Sr., and Jack Javits, in 1958 joined together introducing a bill which would allow a business to engage in joint research.

So from 1958 to 1983 is a quarter of a century. So we have been thinking about this for a quarter of a century, and it seems to me that what has changed in that quarter of a century is not the nature of the problem, but the fact that international competition has accelerated to such a degree that what was simply a creative idea in 1958 has become an urgent necessity in 1983.

Would you agree with that?

Secretary **Baldrige**. I would agree with that completely. That is the whole point, Senator. I would welcome any intervention in the future. We can use all the help we can get.

Senator **Mathias**. Well, I was not sure the Senator from Ohio would welcome it. [Laughter.]

But in any event, I hope the staff will advise him that this is not new ground we are breaking, but has been well plowed for a quarter of a century.

I anticipate, on the basis of the statement that has been filed in advance in accordance with committee rules, that Professor Brodley will suggest that if we want to authorize joint research and development it ought to be joint research and development only when a specific industry can make a showing that it is both necessary and desirable. He is opposed to the blanket approval or what he considers to be the blanket approval in the bill that is before us.

What would be your view of that?

Secretary **Baldrige**. Well, I think that is a classic dichotomy that we have between businessmen who provide jobs and those in love with the law.

And I am certainly one of those who love the law, but the two antitrust laws have been around a long time—one, I think, was 1890, the other 1914. The state of the economy at the time was different. We simply cannot now describe the U.S. domestic economy without realizing that it is an internationally competitive arena, whether you export or not.

You are going to be competing against imports almost no matter what business you are in.

And to say that an industry or group of businesses would have to prove some kind of absolute need to collaborate for joint R&D would be taking away one of the major thrusts of this bill. You cannot, even in research and development, narrow the benefits down to those industries that are clearly in need. Industries that may not be in need today, if they keep up to date with research and development, may be in need tomorrow.

And I come back to the central point: in today's international competition, we are talking about U.S. jobs. And we have to recognize all the time that our trading competitors around the world do have the advantage of being able to combine in research and development activities. I think it is ridiculous, absolutely ridiculous, that U.S. firms are not allowed that same chance.

Senator **Mathias**. Now, we have before us several bills that contemplate joint research and development. One is my own, Senate bill 737. Senator Tsongas has a bill, Senate bill 568. Senator Glenn has introduced Senate bill 1383. And then there is a fourth draft, which to my knowledge, has not been introduced, but which is, I believe, the product of the collaboration between your department and the administration as a whole.

And in that fourth draft there is a de-trebling provision.

Secretary **Baldrige**. Pardon me, Senator, a what?

Senator **Mathias**. Well, that is a little slang I picked up from Mr. Baxter, de-trebling. That is striking the provisions for treble damages. It is a new word in federalese. It is the Baxter addenda, the Baxter addenda to the Federal lexicon, I think.

Secretary **Baldrige**. It may be good law, but it is bad English. [Laughter.]

Senator **Mathias**. Well, you turn around and fuss with him about that; do not fuss with me. [Laughter.]

But in any event, what I would like to inquire of you is whether it is a good idea to bring into the same legislative vehicle both the legislation to clarify the application of the antitrust laws as they relate to joint research, which was my original purpose, and the proposal to eliminate treble damages in cases of this sort.

Should we try to do both of those things in the same bill?

Secretary **Baldrige**. I believe so, Senator, because the treble damage provision is clearly one of the great inhibiters toward people or businesses trying to combine on some kind of joint venture in research and development. That is a very, very powerful disincentive, very powerful.

Senator **Mathias**. Well, without arguing with you about that, I am concerned about loading up a bill to the point that it arouses the kind of concerns and very genuine concerns that the Senator from Ohio has expressed here this morning.

Now, if we were merely clarifying the antitrust attitude toward joint research, he might not feel the same degree of concern. And I would just urge the administration to think about not only, perhaps, the optimum goal that can be reached, but the practical limits to which we are likely to be able to go.

Secretary **Baldrige**. Well, I would just point out, Senator, that we are in a big, tough game right now, and we are talking about U.S. jobs. I hate to keep coming back to that, but that is the absolute fact.

Senator **Mathias**. You do not have to convince me of that. That is why I introduced the bill in the first place.

Secretary **Baldrige**. Well, I realize that. But when you say that perhaps we should not strive for the optimum, my answer is that be our competitors, the people who want to take the jobs away from us, are already at the optimum. I do not see why we should handcuff American industry in this regard.

Senator **Mathias**. Well, of course, under the approach of the earlier bills that were introduced, which did not disturb the treble damage principle, there would be little impact from treble damages because we provide a way in which joint research can be properly carried forward so that you may be stirring up more of a problem than really is necessary.

Secretary **Baldrige**. Yes, sir, I agree with that point. On the other hand, if treble damages are kept, you stir up a lot of lawyers around the country who are looking for good paychecks by initiating suits all over the place. You see that all the time. Some of them are worthwhile; some of them are nuisances. But the nuisances in themselves create a lot of trouble for companies.

Senator **Mathias**. That is not a very good argument to a committee of lawyers, you know.

Secretary **Baldrige**. I know it, but it is the best I can do, Senator. [Laughter.]

Senator **Mathias**. Well, I have just one other question, which is bound to come up in our debate here, and of course, as you have said, one of the reasons for considering this legislation is predicated upon protecting American jobs, protecting the ability of American industry to compete in the world.

But sooner or later somebody is going to raise the question as to whether or not joint research is authorized between an American company and a foreign company. And it will probably come in some difficult and complex form, such as the foreign subsidiary of an American parent company.

What are your thoughts as far as that is concerned?

Secretary **Baldrige**. It is going on now. It is inevitable. We are going to see in the future more and more consortiums of companies from different countries embarking on projects.

I might point out that the trend in Europe has been very strong in that direction. One of many examples is Airbus, which is a consortium of several companies from several countries, that banded together deliberately to take part of the aircraft market.

But we see the U.S. participating in those too, and I think we are looking at an inevitable trend. In most cases, for a very simple reason, there is not enough capital available for the size of the project if it is limited to one country or a group of companies from one country.

Senator MATHIAS. We thank you very much for opening this debate, Mr. Secretary.

Secretary BALDRIGE. Thank you, Senator.

Senator MATHIAS. We appreciate the benefit of your views.

Secretary BALDRIGE. I am very pleased to have been here. This is a very worthwhile hearing.

Senator MATHIAS. Well, I hope before it is all over we can make it worthwhile in any event.

Thank you very much.

[Prepared statement follows:]

STATEMENT OF
MALCOLM BALDRIGE
SECRETARY OF COMMERCE
BEFORE
THE SENATE JUDICIARY COMMITTEE
ON S. 568, S. 737, and S. 1383

Mr. Chairman and members of the Committee, thank you for this opportunity to express my views on S. 568, S. 737, and S. 1383 three bills dealing with joint research and development and the antitrust laws.

I want to state right away that this Administration agrees fully with the objectives of these three bills. We need to change our antitrust laws to encourage more joint research and development.

Joint research and development programs are procompetitive. They reduce duplication, promote the efficient use of scarce technical personnel, and help to achieve desirable economies of scale. Small firms are able to collaborate in joint research and development projects, which because of prohibitive costs, they could not do by themselves. Large firms are jointly able to tackle today's large and complex technological problems, which are often beyond the ability of single firms. For all of these reasons, joint research efforts are key factors in the ability of countries to stay competitive in the international marketplace.

Our major trading partners have focused collaborative efforts on research and development in high technology industries. Through permissible arrangements under their antitrust laws these countries and the European Economic Community have targeted for intensive joint research and development certain hi-tech industries, where the U.S. has a technological lead. As a result our foreign competitors have been able to narrow the gap in many of these industries.

Japanese antitrust law did not prohibit Japanese firms in recent years from conducting collaborative research and development in MITI targeted areas such as computers, microelectronics, electronic instruments, lasers, optical communication, robots, and aerospace. Earlier this year Mr. Kuzuhero Fuchi, Director of Japan's Institute for New Generation Computer Technology (NGCT), announced a ten-year collaborative joint research and development venture with industry to create a so-called "Fifth Generation" computer. With this program the Japanese hope to leapfrog the U.S. computer industry.

Similarly, French antitrust law did not deter French firms from conducting massive joint research and development projects in such areas as aerospace, telecommunications, microelectronics, energy, and conservation equipment. West German antitrust law also has not substantially inhibited joint research and development in computers, microelectronics, and electronic office equipment.

Further, the European Economic Community has exempted several collaborative joint research agreements of individual member countries from the antitrust restrictions of Article 85 of its Treaty. For example, the European consortium Airbus Industrie led by France and West Germany has been able to conduct joint-design, testing, and manufacturing, which assisted them in capturing roughly a quarter of the jet aircraft market in 1981. Prior to that, joint research and development had been authorized in such areas as nuclear oxide fuels and electronic components.

It is essential to our long-term economic well-being that U.S. industries have the same opportunities to engage in joint research and development as our competitors.

U.S. firms, however, have consistently expressed the view that they are handicapped in competing in international markets because our antitrust laws inhibit joint research and development. U.S. firms say they are hesitant to invest heavily in joint research and development projects because of the risk of treble damages and criminal sanctions under existing antitrust law.

The antitrust risks perceived by U.S. companies in conducting joint research and development has persisted despite the Department of Justice "Antitrust Guide Concerning Research Joint Ventures", which attempts to clarify how the antitrust laws apply to a given set of facts. For one thing, guidelines by their nature have to be somewhat ambiguous to allow room for flexibility of enforcement policies which can vary from one Administration to the next. There is a limit to how much any given statute can be clarified by guidelines or through the review procedure to get desired results in the antitrust area given the role of the courts and the general language of the Sherman and Clayton Acts.

The Business Review Procedure of the Department of Justice has not dispelled industry's fear in this area. The Business Review regulations provide that upon a request setting forth proposed business conduct, the Department of Justice may issue a letter stating its present enforcement intention. It does not shield the venture from future DoJ challenge, and is not binding on the courts in private suits. Moreover, there is no assurance that the enforcement policy stated therein will not change from one Administration to the other.

Mr. Chairman, the risk of treble damage liability has inhibited collaborative R&D and has placed U.S. industry at a disadvantage in the international marketplace. Therefore, I am pleased that both this Administration and members of Congress are in agreement as to the need to change our antitrust laws to address this problem.

So far during the 98th Congress five legislative proposals have been introduced. In addition to the three bills that are the subject of these hearings, H.R. 108 has been introduced by Congressman Edwards of California, and H.R. 1952 by Congressman Synar.

I will now comment briefly on some of the provisions of the three bills that are being considered at this hearing.

a. Approval of the Attorney General

Both S. 568 and S. 1383 require the Attorney General to approve the joint research and development venture. S. 737 does not. In our view, formal approval by the Attorney General assigns the Department of Justice a regulatory role inconsistent with its role of enforcing the antitrust law. The approach of S. 737 is more desirable as it provides only an enforcement role for the Attorney General.

b. Protection from Antitrust Laws

For joint R&D ventures and their participants, all three bills would preclude criminal and treble damage liability. They would also allow Government suits for injunctions and suits for actual damages by private individuals. I believe, however, that the desirable approach is to eliminate all private antitrust actions against joint R&D, and all Government damage actions. The Government could, however, seek an injunction against any activity that it determines to be harmful to competition.

c. Conditions for Conducting Joint R&D Venture

Both S. 568 and S. 737 require joint R&D ventures to comply with several conditions before they are entitled to protection from the antitrust laws. S. 1383 does not place any conditions on the joint R&D venture.

The conditions set out in S. 568 and S. 737 include restrictions on the length of the programs, the way they are organized, who shall be eligible participants, and the licensing of resulting patents.

The listing of conditions for joint R&D ventures is contrary to the cornerstone of this Administration's policy to minimize Government intervention in the marketplace. All that should be necessary, in my view, is a notification to the Government identifying the participants of a joint venture, and a description of the R&D to be undertaken, accompanied by any agreements between the participants.

In sum, I believe the essential elements of a joint R&D bill are:

(1) Assign only an enforcement role to the Government;
(2) Protect joint R&D ventures from all private actions and governmental damage actions; and
(3) Eliminate all conditions, except notification to the Government of the venture, its participants, and its scope.

I am pleased to say that these three elements will be included in the R&D section of an antitrust reform package which is under review in the Administration. This package would exempt joint R&D from all private antitrust actions and all government actions for damages under the antitrust laws based on conduct that is part of a research and development program that has been disclosed to the Government. The Government, however, could seek an injunction to halt any actions by the joint venture thought to be harmful to competition.

The proposal under review in the Administration would thus avoid any Federal interference as to how the joint R&D venture will be conducted. Further, as only notification of the joint venture to the Government is required, the "paperwork" burden on the private sector and the Federal Government is minimal.

I am confident that enactment of this proposal will remove any disadvantage our antitrust laws now impose on U.S. industry in conducting joint research and development.

In addition to the new R&D section, the proposal under review in the Administration contains four additional reforms in the antitrust laws which are of equal importance. These additional reforms are: a section which would eliminate treble damages for non per se antitrust violations; a section assuring that Intellectual Property licensing under the antitrust laws is a non per se offense; a section dealing with patent and copyright misuse; and a section dealing with process patents.

The three sections of the antitrust reform proposal dealing with intellectual property are of special concern to this Department. The first two of these sections deal with intellectual property licensing. One would amend the antitrust laws to require the courts to hear evidence of the actual economic effects of intellectual property licensing arrangements instead of automatically holding certain practices illegal that may or may not be anticompetitive. The other would lessen the intrusion of the patent misuse doctrine into the patent licensing process. Licensing is an important method for holders of intellectual property to commercialize their ideas and inventions. This is particularly true for the small businesses and independent inventors who frequently rely on innovative licensing arrangements to commercialize their ideas and inventions. It is especially unfortunate that such small entities must conduct their licensing activities according to rules based on questionable competitive theories developed by courts in situations involving large national and multinational firms. In fact, this results in the irony that a holder will be on safer legal ground by refusing to license at all -- hardly a result that encourages competition. Limiting the antitrust laws and patent misuse doctrine to these situations where the effect of the licensee would clearly lessen competition would restore licensing freedom in cases where licensing would actually promote competition.

The third section expands the coverage of a process patent to include the use or sale of the product made by that process. Unlike the patent laws of most industrialized countries, the use or sale of such products in the United States or the importation of such products made abroad is not an infringement. The only remedy available to a process patentee with respect to a product made abroad by a patented process is under Section 337a of the Trade Act of 1930, and that remedy is uncertain. Expanding the scope of a process patent to include the resulting product will bring United States patent law into conformity with that of Japan and some of our major European competitors such as the Federal Republic of Germany, France, Italy and Great Britain. This amendment, I believe, will close an important gap in the protection of advanced process technology developed by U.S. industry.

Mr. Chairman, this concludes my testimony. I will be pleased to answer any questions.

Senator **Mathias**. Our next witness is the Honorable William F. Baxter, Assistant Attorney General of the United States in charge of the Antitrust Division.

Mr. Baxter, will you proceed as you wish. If you wish to read your whole statement, you are free to do that. If you wish to summarize it, the whole statement will appear in the record.

STATEMENT OF HON. WILLIAM F. BAXTER, ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Mr. **Baxter**. Thank you very much, Senator. I would request that the statement that I have prepared and submitted be included in the record. My own preference, if it is acceptable to you, would be simply to make a short summary and then respond to any questions that you may have.

Senator **Mathias**. The full statement will appear, and you can proceed as you wish.

Mr. **Baxter**. Thank you. We are delighted at this opportunity to talk with you about the several bills that have been introduced having to do with joint R&D ventures and also about the proposal which I expect will be forthcoming quite shortly that is a proposal that the administration has been working on for some time and as to which we now, I think, have complete agreement between the Department of Justice and the Department of Commerce, although there is not yet an official administration position.

We are very sympathetic to the central purposes of the several bills we have before us, S. 568, S. 737, and S. 1383. We do, however, have difficulty supporting any one of those bills because of problems we find in each.

If I may turn very briefly to those bills first I would make the following remarks about them. Two of them we find troublesome because they would turn the Department of Justice into a regulatory body with regard to joint R&D ventures. They require us essentially to certificate and by the act of certification, to cut off private rights under the antitrust laws.

As a matter of administrative law, that would require that we conduct something on the order of a trial-type hearing. Our findings and conclusions would be subject to judicial review, and we very much shy away from that particular approach. In our view, there is nothing that can be accomplished through a certification procedure that could not be accomplished much more easily through a much less elaborate and much less costly procedure along the lines that I will describe.

S. 737 embodies the general procedural approach that we have in mind, although there are other features to that bill that we find objectionable.

S. 568 and S. 1383 embody a certification procedure which we find objectionable.

On the other hand, the S. 568 and S. 737 really do not address the competitive problems that can arise from joint venture. The standards that appear in those bills are addressed primarily to issues of equity among the companies and to the ability of other companies to join the joint venture. And those bills also are very intrusive in the sense that they attempt to control the way the ventures are set up, the way they are managed, the kind of licenses that can be issued, and when technology would have to be made available to firms outside of the venture.

We think it is possible and highly preferable to take a much simpler and cleaner approach to the joint venture problem. At the same time, it is our view that deterrence of joint venture activity by the antitrust laws has by no means been the major force of the antitrust laws in impairing our international competitive situation.

The antitrust laws have been brought to bear on our laws dealing with intellectual property, on our patent laws, on our copyright laws, and on the laws that deal with trade secrets in a way that significantly undermines the purpose of those intellectual property laws.

Those laws are designed to overcome the free rider problem that is associated with invention or innovation, the fact that people can sit back, not make investments themselves, and then copy what someone else has developed.

Those laws are intended to allow the people who have made inventions, and who have contributed innovations to appropriate the value of their contributions to themselves, to hold onto them exclusively, or to permit others to use them only through negotiated licenses.

And in a wide variety of ways, too complicated, perhaps to discuss in any detail this morning, the antitrust laws by constructing a welter of thou shalt nots about particular provisions in licensing arrangements, have taken the profitability out of innovation. And so the administration's approach to this problem is a rather broader one that addresses the joint venture problem, to be sure, but it also attempts to cut back on the intrusiveness of antitrust in its interaction with these intellectual property laws.

And finally, to come to the provision that you noted in your discussion with Secretary Baldrige our proposal contains as well a general elimination of the treble damage provision in certain areas of antitrust.

It would preserve the treble damage remedy in those areas that are covered by any of the existing per se rules, and that embraces most of the areas where the prohibited conduct is covert or secret; all classical cartel behavior would continue to be subject to these highly punitive provisions, but in these contexts, appropriate provisions.

It does, however, eliminate the treble damage remedy, de-treble, if you wish, in the non-per se areas.

Senator MATHIAS. If you wish. [Laughter.]

Mr. BAXTER. I agree with the Secretary that it is deplorable English, but I do maintain it is good law.

Senator MATHIAS. I did hear it first from you.

Mr. BAXTER. There are a wide variety of other areas, merger activity, many forms of joint venture activity other than R&D, arrangements among companies that enjoy adjacent positions in manufacturing and distribution, the kind of arrangements that are typically described as vertical by antitrust lawyers that occur right out in the open. In those situations, everybody knows what is going on, and there is no question about whether those activities will be discovered.

The law in many of those areas under the so-called rule of reason is not terribly clear. The activity that lies near the borderline but is not in fact prohibited by the law is often very socially useful activity. If conduct which is governed by these rather vague rule of reason areas, conduct that is difficult to distinguish from socially productive behavior that looks very much like it, continue to be governed by treble damage remedies, desirable kinds of behavior are seriously overdeterred.

That is the link between the de-trebling provision and the rest of these intellectual property provisions. Just as the antitrust laws, as they bear on the intellectual property provisions, have undermined their purpose, so also the general availability of the treble damage remedy, even in the rule of reason area, has imposed inefficiency on our industries and has seriously impaired its productivity in a variety of ways.

The general approach, then, that I expect the administration will be suggesting has five parts. Because of the nature of this hearing, I will really talk about only one of those five parts in any detail.

The five parts are a clearance procedure with respect to joint ventures; a general de-trebling in the rule of reason area; changes with respect to the misuse doctrine, one of those intellectual property areas to which I have alluded that simply says don't call it misuse unless is actually causes some competitive harm; an instruction to the courts that per se rules are not to be used in conjunction with the licensing of intellectual property—it doesn't eliminate antitrust as to those matters, but it does put it in a rule of reason category—and finally, a fairly technical change with respect to process patents and the importation of goods that are made implying patented processes which would be infringing activities if conducted within the United States.

Now, those are the pieces of our proposal. I would be happy to talk further about any one of the five if it were of interest to the committee, but I will confine myself primarily to the joint venture problem.

The system which we are discussing among ourselves, and which I hope we will soon propose to the Congress, would work basically in the following way: a group of companies would decide that they would like to set up a research and development joint venture. Thereupon, they would file with the Justice Department and with the Federal Trade Commission a statement in which they identified the participants, identified the projects which they had in mind, and identified the basic terms of their arrangements.

The act of filing would confer either immediately or perhaps after a lag of 30 or 60 days on the filing companies immunity from private antitrust actions and that is the immunity that in my view is really important. Much less important almost purely theoretical, in my view, it would also confer protection from governmental damage actions as opposed to governmental injunctive actions, but I do not think that is of great consequence. But such immunity would be provided nevertheless.

We would immediately look at that filing, at the industry that was involved, and the number of firms that they proposed to include within the joint venture. We would make an appraisal, I would say more or less under the standards of section 7 of the Clayton Act, as to whether the arrangement would be likely to substantially lessen competition in any line of commerce.

If we thought that a specific proposal was likely to have such effect, or if we needed further information, we would use our existing CID powers to investigate further. When satisfied that there were competitive dangers, we would simply file an injunctive action. In the overwhelming preponderance of cases we would be prepared to do that within 30 days; certainly within 60 days.

In short, we would be in a position to enjoin the venture before significant investments were made. It is my estimation, based in part upon discussions with people in industry who are worrying about this issue, that the industry would find that an acceptable way to go. Representatives from industry may wish to address themselves to that.

The point, and an important one, is that a very large fraction of the proposals that actually come along raise no competitive problems whatsoever. In those situations, all we will need to do is conduct a preliminary investigation, perceive that no competitive problems are raised, and then close our inquiry. It will be quick. It will be cheap in terms of the enforcement resources that are concerned. It will not be necessary to hold a formal hearing that develops a record that is subject to judicial review in all of the cases that obviously do not raise any competitive problems.

And then in instances where we thought competitive problems were raised, we would not behave as an administrative agency. We would use our existing CID powers, we would go into the Federal courts and seek an injunction, and we would do so under the existing rule of reason standards of the antitrust laws.

Both the legislation that is needed to insure this approach and the system itself are the essence of simplicity. And it does seem to me that such an approach accomplishes all of the objectives of the several bills that we have here before us.

Finally, I would like to make one more point, and that is to say a few words about the nature of the competitive problem in the case of joint ventures. The essence of the competitive problem in the case of joint ventures is that two different forms of competition may be eliminated, depending on the nature of the joint venture.

One important form of competition is competition in research and development. If there are four or five or six joint ventures in an industry, then there is rivalry between those joint ventures. Different approaches to the technology will be tried by one and the other.

Companies have an incentive to put more money into their joint venture, rather than less, to try to assure that their joint venture comes out in a good place from an intellectual property standpoint, gets good patents, and stays in front of their rivals. There is a risk of falling behind. Somebody else's joint venture may do better than yours if you do not pay careful attention and make adequate investments in your joint venture.

If, on the other hand, all the firms in an industry, to go to the other extreme, get together in one joint venture, the situation is very unfortunate.

When everybody in an industry is a member of one joint venture, for all practical purposes, the patent laws have been repealed as to that industry. Nobody has any incentive to make this year's appropriations to the joint venture somewhat larger than last year's. There is no risk of falling behind. You will be entitled to whatever research occurs in the only game in town.

There is no prospect of getting ahead; everybody else in the industry will be entitled to the fruits of the only game in town. The incentives to do R&D effectively when everybody in the industry is a member of one joint venture are totally dissipated. It is, as I say, tantamount to repeal of the patent laws.

So, we are very concerned about unnecessary inclusiveness. Now, what do I mean by unnecessary inclusiveness? In an industry that is comprised of a large number of small firms, if some significant number—let us say a number that represents 15 percent of the industry—get together, I am not even interested in asking whether there are really economies of scale that justify that much aggregation, there is going to be plenty of competition and particularly so if the scale of economies do not justify that much aggregation. There are lots of other companies who are going to be able to do the same R&D. Everything is fine. We do not even have to look very carefully in order to bless such an arrangement.

But as the arrangement becomes more and more inclusive, as it includes 20 percent, 25 percent of the industry, now there is room only for three more ventures of similar size out of the remaining 75 percent. When the venture includes 33 percent of the industry, now there is room only for two more ventures.

The opportunity for the continuation of rivalry in R&D is rapidly eroded as ventures become more and more inclusive. Obviously, if scale economies ever justify the inclusion of 51 percent of the firms in an industry, the remaining 49 percent have an enormously strong, equitable claim to be brought in because, by definition, they cannot do as well, comprising only 49 percent, if scale economies justify 51-percent participation in in the first place.

And, of course, as soon as they are let in, you are confronted with the terrible problem of having all the firms in the industry in one joint venture.

So, I would be enormously difficult to persuade, in any circumstance, that it was justifiable to let more than half of an industry in a joint R&D venture. I get progressively more difficult to persuade and progressively more insistent in being shown that the scale economies really do justify that degree of inclusiveness as the aggregation moves above 15 percent, just to take a rough number.

Now, it is this view of the process of competition in R&D that I find so seriously lacking in two of the three bills that we have before us. The third bill, like our own suggestion, merely makes the ventures subject to existing antitrust standards, and that aspect of the bill is perfectly acceptable to me. But the other two bills create immunities from the antitrust laws and then proceed to attempt to substitute totally new, substantive criteria for certification of a venture. In my view, those new substantive criteria are seriously lacking because they fail to take account of what the real competitive problem is, or at least one of the two real competitive problems.

The other competitive problem is that in a highly concentrated industry that is susceptible to collusion and cartelization, the collaboration of all the companies at the R&D level may give rise to serious risks of collusion at the marketing and production levels. That, too, is a matter of concern, but one that I will not discuss at greater length this morning.

Well, Senator, I have spoken longer already than I intended to, but that is the basic approach which we are taking as to this matter. As I say, I hope to have our proposal on paper and up to the Congress within a very short period of time. And I would be delighted to answer any questions that the committee may have.

Senator MATHIAS. Well, however long you have spoken, you have been very edifying and illuminated this issue for the committee.

I note very carefully your appeal for the virtues of simplicity. But I remember that Albert Einstein once said that everything should be made as simple as possible, but not more so. And I am wondering if we could apply that test to this issue.

Mr. BAXTER. I would welcome that endeavor.

Senator MATHIAS. It would be very simple, simply to detreble. That is very neat. It takes a lot of the incentive for controversy out of this whole picture.

Mr. BAXTER. Remember, Senator, we are talking about detrebling only in areas outside of the per se rules.

Senator MATHIAS. I understand that. But when you attack treble damages, you are attacking one of the historic bastions of antitrust. And you are going to rout the interest and the opposition and perhaps even the passions of people in the Senate and people outside the Senate. And to pass any kind of a bill at all, you need—that is highly controversial, you need a minimum of 60 votes, a minimum of 60 votes.

And I am not sure that I can count 60 votes if you get into that kind of a scrap around here. So, having that in mind, I am wondering if you would be agreeable to legislation which might address the joint R&D problem separately from the treble damage question.

Mr. BAXTER. Well, Senator, we would certainly welcome an opportunity to try and explain to the Congress our view that the application of treble damages in the rule of reason area has seriously impaired the productivity of the U.S. economy. I think that it has done more damage by wide measure than any deterrent effect that the antitrust law has had on R&D joint ventures.

I understand what you are saying to me. I quickly acknowledge that your vote counting is undoubtedly vastly more sophisticated than my own, and I certainly can imagine coming to the position of acquiescing in a bill that fixed the joint R&D problem, fixed the other intellectual property problems that I have described, and perhaps detrebled only within those intellectual property areas rather than generally as the present one does. I can imagine trying to work with that.

But to try to fix the joint R&D problem without addressing these substantially more serious impediments to innovation and productivity in the American economy does seem to me to address a very minor problem when there are many other important ones around.

Senator MATHIAS. Did you see the President's news conference last night?

Mr. **Baxter**. No, I did not, sir.

Senator **Mathias**. Well, if you had, you would have seen that he was struggling like Laocoon, trying to get out of the toils of the charges that he was the rich man's President. Now, you get this treble damage issue going in the country, and you will wrap him up in further coils of charges that he is the rich man's President.

Mr. **Baxter**. Quite inappropriately, because the beneficiaries of treble damages are almost in no instance anyone other than people who are already very wealthy.

Senator **Mathias**. It is perceived to be a protection for consumers.

Mr. **Baxter**. It is misperceived to be a protection for consumers.

Senator **Mathias**. You may be entirely right, but in politics it is the perception that counts. [Laughter.]

Mr. **Baxter**. I understand.

Senator **Mathias**. Well, I will not labor this particular subject, but I do think that there is a practical consideration that there is something that needs to be done that I think is capable of being done, and if you load this wagon down too heavily, she is not going to get across the bridge.

Mr. **Baxter**. I understand your message, Senator.

Senator **Mathias**. All right.

Mr. **Baxter**. And I am sympathetic to it. I am.

Senator **Mathias**. Senator Specter?

Senator **Specter**. Thank you, Mr. Chairman.

Let me first express my surprise at not having Secretary Baldrige here. I had expected him to be present for the hearings. So, I would like to explore these subjects with you, Mr. Baxter, which I had wanted to talk to him about.

Mr. **Baxter**. Yes; he was here earlier.

Senator **Specter**. I know he was here earlier. He simply was not here after the vote was taken. But I checked with the chairman and found out that he was here by invitation and not subpena. So, that perhaps accounts for his untimely departure.

But we shall——

Mr. **Baxter**. Have I been subpenaed? [Laughter.]

My staff did not tell me.

Senator **Specter**. I do not know. Have you been? To be subpenaed service has to be personal.

Mr. **Baxter**. Oh, does it have to be personal? Then I have not then. [Laughter.]

Senator **Specter**. By having you here, we always could.

Mr. **Baxter**. I will try to keep that in mind.

Senator **Specter**. Mr. Baxter, the tail end of Secretary Baldrige's testimony, before we had to break about 10:10 for the vote on the tax cap, concerned the competitive advantages which other steel producers in other countries have over the steel producers in the United States.

And that raises a great many issues. I would like to explore with you for just a moment whether you know the nature of the practices of other steel companies, say, in the European Economic Community, or in Japan or Brazil, with respect to the issue of research and development.

We know they are not inhibited by antitrust laws like ours. Do they in fact engage in joint research and development practices?

Mr. **Baxter**. I am a little confused, Senator, because I was not aware of any references to the steel industry in the Secretary's statement.

The steel industry is, of course, in some difficulty in the United States. And I would not think that the inability of joint R&D was one of the steel industry's major problems. There are, of course, technological problems that remain to be solved: Alloys, high-temperature composite materials, other things, but, by and large, it is a mature industry and R&D, I simply repeat myself, I would not think was one of its major problems. And, therefore, I would not see this R&D joint venture bill as being of very great significance to the steel industry as opposed to a variety of other high-technology industries.

Senator **Specter**. Mr. Baxter, I think it is. I was at the Bethlehem Steel plant in Steeltown, Pa., on Monday, and saw the applications of computers and other high-tech devices which are being used in the production of steel; there is some $85 million in new equipment there. I was also at Allegheny-Ludlum, a specialty steel producer in the Pittsburgh area on Friday, and again saw aspects of research and development and high technology.

I have been told that this is a very important factor. Of course, these factual issues are very hard to analyze with any particularity.

Mr. **Baxter**. Well, we need not disagree on that. In any event, the provisions of the joint venture bill would be available to the steel industry for such use as they might be able to make of them, as to all other industries. If it is important, we will find that out once we pass it.

Senator **Specter**. Well, in looking to, say, the Japanese, who have done so well on research and development, it is clear that they are not inhibited by antitrust laws. So they can work together jointly.

Has it been established that their incentives have been reduced? You testified about a concern you have about the reduction of incentives. If you are a participant in the only game in town, why work hard? You can just share the fruits. Has that been the experience in Japan, if you know?

Mr. **Baxter**. Well, I do not know; I think it is very hard to know. In the first place, it is not true that Japanese industry is not confronted by antitrust laws. The Japanese have antitrust laws that, quite frankly, are somewhat more restrictive than our own antitrust laws.

Senator **Specter**. Are they enforced?

Mr. **Baxter**. Yes, indeed, they are enforced.

Senator **Specter**. Do they apply to prohibit joint research and development?

Mr. **Baxter**. They are worded generally as all laws are worded generally, and joint research and development is potentially within the scope of their wording. It is true, I believe, in Japan, as it is true in the United States, that the antitrust laws have never been applied to block joint research and development.

We have no instances of that; I am not aware that they do either.

Senator SPECTER. Mr. Baxter, I would like to approach one subject with you which is very much on the mind of the specialty steel industry, and my own, for the last several days. We are looking to a decision by the President on an International Trade Commission recommendation, and it touches on this subject.

The specialty steel industry has a major concern about subsidies in foreign steel. This is a subject you and I have discussed in a variety of contexts before. Is there any conceivable application of the U.S. antitrust laws when a situation exists where there are public officials who make financing available, for example, to a country like Brazil, as for example, through the International Monetary Fund. What happens if Brazil then subsidizes its steel industry, specialty steel specifically, and that steel then enters the United States as a subsidized product?

Is there any possibility that any of the participants in that circle could be in violation of the U.S. antitrust laws?

Mr. BAXTER. That is quite difficult to imagine. A variety of doctrines travel under the general heading of sovereign immunity, act of State doctrine, and indeed the Noerr-Pennington doctrine that is an attempt to shelter communications between citizens broadly defined and their governments, a first amendment phenomenon, basically.

Senator SPECTER. It protects secretaries as well as governments?

Mr. BAXTER. I think very likely. Now, I mean, I can make up a case for you——

Senator SPECTER. Could you?

Mr. BAXTER [continuing]. Where I would be willing to indict a secretary, but I think you would find it a little fanciful.

Senator SPECTER. What is the answer to the kind of problem that I hear so much about from the steelworkers at Allegheny-Ludlum? They complain about paying taxes to the U.S. Treasury, which advances $8.4 billion to the International Monetary Fund, which advances money to Brazil, which advances money to Brazilian steel, which is imported into U.S. markets, in violation of U.S. law, and takes away the job of the taxpayer at Allegheny-Ludlum?

Mr. BAXTER. Well, I think there are two answers, the only two that I know of. The Congress, of course, can by legislation control the standards pursuant to which the Treasury advances money to the IMF and, indeed, has effective control or certainly very strong influence over the terms on which the IMF advances money to Brazil.

Furthermore, and it seems to me perhaps more practical, certainly from the standpoint of the executive branch what the executive branch should be doing about that is self-initiating and pursuing very, very vigorously countervailing duty cases and dumping cases where they appear.

Senator SPECTER. Well, there is an effort now being made by the International Trade Commission to limit imports of specialty steel, and that decision has yet to be made by the President.

Mr. BAXTER. Yes.

Senator SPECTER. There are those who argue that specialty steel is trying to get a 5-year period so they can focus on capital improvements. And they are talking about very substantial sums if they can get the 5-year period. The ITC has recommended 3 years, and I am advised that there are very loud voices within the administration urging the President to impose no limits at all on their doing so on the grounds that it is protectionism. But it is really not protectionism to stop subsidies; free trade means the absence of subsidies; it means competition without subsidies.

These concepts are subject to considerable misinterpretation, and it is very, very difficult to deal with them. When you talk about vigorous administrative policies, here are arguments coming back that they want to stop protectionism, when specialty steel is not seeking protectionism.

It is asking really for free trade and to stop Brazil, for example, from subsidizing.

Mr. BAXTER. Well, I agree with what you say, Senator. I myself make a very sharp distinction between generalized import controls in the form of quotas, even in the form of tariffs, although tariffs are far less offensive than quotas, on the one hand, and specific retaliatory responses to foreign government subsidization, or indeed to dumping, on the other.

Senator SPECTER. Mr. Baxter, let me take up one more subject with you briefly. Chairman Thurmond has scheduled hearings at my request on the situation involving Fairless Steel, United States Steel, on the issue as to——

Mr. BAXTER. Importation——

Senator SPECTER. Yes. And that raises a complex range of problems. We would like to save jobs in the United States to the extent that we can, and we do not know all the facts, and that is why we are going to have the hearing. There are big danger signals on the horizon if we are going to engage in importing British steel, which is very heavily subsidized, in terms of the long-range effect on the American steel industry.

I would be interested in your observations as to the possible range of antitrust laws which might apply to factual situation.

Or perhaps you would like me to ask a more narrowly phrased question, and I would be glad to do that.

Mr. BAXTER. Well, Senator, you ask very difficult questions, and I am not sure that I have instantaneous answers to them. Again, as I said to you before, I am very, very hostile to the process of governmental subsidization of industries for the sake of preserving jobs. And that, of course, is what is going on in much of Europe, as you know. I would like to find some way to offset that and in so far as British steel was being subsidized, a specific retaliatory response—under the GATT, of course, it must take the form of countervailing duty, which is very confining, it seems to me quite appropriate. On the other hand, one must be very careful of any policy response which would have the effect of causing a general increase in the price of steel in the United States. Any response that would have the effect of causing a price increase for steel in the United States will merely redefine the industry in which the unemployment occurs.

Our automobile industry, for example, would be very seriously impacted in its competition with the Japanese automobile industry if the prevailing price of cold-rolled sheet in the United States were

10 percent higher than it is. And we would not gain anything by shifting the locus of unemployment from the steel industry to the automobile industry. And that is a very, very major problem and a very important relationship that gets overlooked, it seems to me, in many trade discussions.

Senator **Specter**. Well, if it has been established that the British steel is very heavily subsidized by the British Government, then if United States Steel proposes to buy that steel and use it at its Fairless plant, is there a violation of the U.S. antitrust laws?

Mr. **Baxter**. I do not believe that there is. The closest imaginable charge would be one of predatory pricing of the resultant finished steel, but it just does not seem to meet the requirements or indeed even the underlying concepts of predatory pricing.

I think that is a situation that would properly be handled by our trade laws, and it would probably be a mistake to try and twist our antitrust laws into a contour that was capable of dealing with that problem.

Senator **Specter**. Would you think then that there would be no private right of action? Bethlehem Steel is broadly quoted in the press and media as contemplating legal action. The United Steel Workers have been broadly quoted to the same effect. These questions are difficult to evaluate because of the complexities of the factual situations. We lawyers could spend endless hours on factual discovery, and equally lengthy periods of times on legal analysis and argument, to hone a very fine issue which might be decided by a 5-to-4 Supreme Court decision.

So, I realize the complexities of the question. But I think it is worth exploring the question to the extent we can, recognizing our limitations.

Would you say that the parties in opposition to this proposed agreement have no private remedies in the courts?

Mr. **Baxter**. Senator, I am sure they have a very substantial number of talented lawyers working on that problem and that they have spent many hours on it. I am hesitant to second guess them off the top of my head in response to your question without any opportunity even to think about it, let alone research it.

I guess the only thing I am prepared to say at this moment in time is that I cannot now think myself of a private remedy that is likely to be helpful to them.

Senator **Specter**. Has any complaint been formally filed with the Department of Justice's Antitrust Division which raises an issue as to the United States steel-British steel arrangement?

Mr. **Baxter**. Senator, you should know that when complaints are filed, they are referred immediately to one of my sections where an initial look is taken, and unless my career lawyers decide that the matter is sufficiently interesting to open a preliminary investigation, I would not even find out about that.

Senator **Specter**. I thought I might be treading on grounds of confidentiality, but not grounds of no notice.

Mr. **Baxter**. No. I am simply cautioning you that my information is often incomplete as to matters that have just recently come into the office. But with that caveat, I would have to say that I am not aware of any such complaint.

Senator **Specter**. I would think that you would be advised of this situation because of its notoriety and serious impact on a major industry.

Mr. **Baxter**. It might well be.

Senator **Specter**. Mr. Baxter, I thank you very much for being here. Thank you very much for your responses. Your testimony is always enlightening. Senator Mathias has already made it edifying, but I find it very enlightening to talk about these issues with you. So, I thank you.

Mr. **Baxter**. Thank you, sir.

Senator **Mathias**. Thank you very much, sir.

[Prepared statement follows:]

STATEMENT

OF

WILLIAM F. BAXTER
ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION

Mr. Chairman and members of the Committee:

I welcome this opportunity to present the views of the Department of Justice on the three related bills, S. 568, S. 737, and S. 1383, and on an alternative to the approach taken in those bills which I believe is a more effective way to stimulate technological growth and to increase productivity and innovation.

The three bills on which I have been asked to testify deal with joint research and development (R&D) activity by U.S. firms. The bills appear to be a response to concerns that United States firms are somehow at a disadvantage when competing against foreign firms in international markets. The bills also recognize, at least implicitly, that the growth and improvement of technology are necessary to foster a strong and productive economy. While the Department of Justice strongly concurs that the stimulation of technological advance is vital to our economic well-being, we believe the approaches taken by S. 568, S. 737, and S. 1383 do not represent the most effective means of inducing innovation. Those bills are too narrowly focused, create unnecessary regulatory burdens, and in some ways may inhibit, rather than stimulate, technological innovation. We believe a much broader approach will more effectively stimulate technological growth, and we have developed a comprehensive legislative package to that end.

A. A Legal Climate That Is Conducive to, and Stimulates Technological Advance Is Necessary to Foster Innovation and Productivity

It is extremely important that the United States have a legal and economic environment conducive to the creation and exploitation of new technologies. Most obviously, new technologies increase the variety of goods and services available to satisfy the demands of consumers. More importantly, new technologies often enable society to produce existing goods and services far more efficiently--that is, using fewer of society's resources. By lowering prices and increasing efficiency, advances in technology result in increased ouput, reduced inflationary pressures, and higher productivity. As a result, technological growth plays an important role in improving the well-being of consumers and in increasing the ability of United States industry to compete in international markets.

The creation of technology is an economically risky undertaking. There is no guarantee that research will uncover a promising technological concept. We all can recall numerous lucrative technological breakthroughs that have been successfully developed by R&D efforts. Much R&D, however, results in at most minor technological improvements that, although cumulatively important to improving our economy's efficiency, are individually only marginally profitable. The adverse effect that the risky nature of R&D has on the incentives to invest in the creation of new technology is exacerbated by the fact that the sophisticated R&D necessary today has become increasingly expensive.

Because the essence of technology is information and it generally is difficult to prevent others from duplicating information once it is created, even the creators of spectacular technological breakthroughs may be unable to earn a substantial return on their investment in R&D. "Free-riders" on, rather than creators of, the technology may be able to appropriate the bulk of the economic benefits that result from the technology. The exclusive property rights established by the various regimes of intellectual property are, in fact, designed to overcome this free-rider problem. Intellectual property rights have served our economy well by providing a market solution that provides inventors and innovators with rewards for their R&D efforts that reflect the benefits that their technological creations confer on society.

After a successful technology is created and provided with some form of intellectual property protection, the technology still must be commercially exploited before the inventor can earn his reward and society can realize the full benefits of that technology. Intellectual property also serves this end. It provides a legally defined "commodity" that can be transacted in the market. As a result, through contractual arrangements, the inventor can combine his intellectual property with the goods and services of others and thus bring the technology in a commercial form to the marketplace more quickly and at lower cost than otherwise would be possible.

Because of the importance of technological advance, it is crucial that the legal system is designed in such a way as to foster and not inhibit the growth of technology. The legal system therefore should be designed to minimize the economic and legal risks involved in the creation, protection and exploitation of new technology.

If properly drafted, legislation directed at encouraging R&D in the context of joint ventures can induce increases in technology. However, focusing solely on improvements in the legal climate that affect the creation of technology while ignoring improvements in the law that relate to the protection and exploitation of technology is unnecessarily narrow. After a careful review of the available alternatives, the Departments of Justice and Commerce have developed a package of five legislative proposals which deal with all phases of the innovation process and seek to improve significantly the climate for the growth of technology. While one of these proposals provides what we believe is the optimal solution to the antitrust risk faced by joint R&D ventures, the other four proposals go much further to increase the incentives for innovation.

B. A Five Part Legislative Package Will Significantly Increase the Incentives for Investment in R&D And for the Efficient Exploitation of New Technologies

The first part of the Administration's approach responds to the perception that the risk of antitrust treble damage liability inhibits the formation of procompetitive joint R&D ventures. The Department of Justice believes that the substantive antitrust standard itself is not hostile to joint R&D activity per se and condemns only anticompetitive R&D ventures. We recognize that there is some uncertainty under the antitrust laws as to whether a particular joint R&D venture will be found illegal. However, it is inevitable that some uncertainty will attend any economic analysis that is sufficiently flexible to distinguish procompetitive from anticompetitive activity in a myriad of factual circumstances. Even though the risk of an incorrect legal decision may be small, that risk is exacerbated by the length, complexity and cost of antitrust suits and the fact that a successful claimant under the antitrust laws is automatically entitled to three times the damages actually suffered. This risk may have deterred the formation of some procompetitive joint R&D ventures.

The Administration's approach to solving this problem would clarify that joint R&D may not be condemned as per se illegal under the antitrust laws. In addition, for joint R&D ventures that are fully disclosed to the government, the proposal would provide immunity from all private antitrust suits and from government antitrust damage suits. If a joint R&D venture proved to be anticompetitive, the government could still challenge it under the current antitrust standard. The Administration's approach thereby would eliminate any possibility that antitrust uncertainty might deter procompetitive joint venture activity, while retaining adequate safeguards against anticompetitive joint R&D activity.

Because the ability commercially to exploit technology once it is created is necessary to provide the optimal incentives for investment in R&D, it is not enough merely to reduce the antitrust risk surrounding joint R&D ventures. In addition, it is necessary to assure that the legal climate does not unnecessarily inhibit the efficient exploitation of technology. Three parts of this approach would amend the antitrust, patent and copyright laws to promote the efficient exploitation of technological innovations. One of these parts would eliminate mandatory treble damage liability under the antitrust laws for all practices that are not clearly and inherently anticompetitive. Another of these three parts would clarify that courts may not condemn intellectual property licensing arrangements as per se antitrust violations. The third part would preclude the courts from relying on the misuse doctrine to deny enforcement of patents or copyrights on competition grounds unless the conduct deemed to be misuse rises to the level of a violation under the antitrust laws.

Turning to the first of these three related parts, the threat of mandatory treble damages is a necessary and appropriate deterrent to conduct that is clearly anticompetitive and is carried out in secret, as in the case of price fixing among competitors. Such a punitive damage remedy is counterproductive, however, when it applies to conduct that can be procompetitive and is carried out in the open. Because treble damages greatly increase the costs associated with the risk that some court might incorrectly condemn a particular procompetitive practice, the remedy can inhibit a wide variety of procompetitive arrangements. The remedy has a particularly pernicious effect on the incentives to innovate because it tends to overdeter licensing of intellectual property, an activity that usually increases efficiency and thereby increase the returns to investments in R&D.

Our approach of prohibiting courts from condemning as per se illegal intellectual property licensing arrangements is similarly motivated. Courts would be required to consider the procompetitive benefits of a licensing arrangement before finding that it violates the antitrust laws. Such an amendment would inform the courts that intellectual property licensing arrangements generally enhance, rather than impede, innovation and productivity and that the antitrust laws must be sensitive to this fact.

The Administration's approach would change the patent and copyright doctrines of misuse for much the same reason. Currently, some courts employ the misuse doctrine to deprive an intellectual property owner of his exclusive rights on the basis of vague notions of what seems "unfairly" anticompetitive to them, without engaging in the careful economic analysis that the antitrust laws should employ. As a result, the courts have effectively denied some inventors the fruits of their genius because those inventors engaged in conduct that upon close scrutiny is actually procompetitive. The Administration's proposal would prevent this possibility.

The final part of the Administration's five part proposal would improve the protection afforded to process patents. The current law contains a "loophole" that allows the unauthorized importation of products made outside this country by employment of the patented process. By providing an effective means to circumvent the exclusivity that the patent laws otherwise provide to a process patent holder, this loophole reduces the returns to owners of process patents and thereby diminishes the incentive to invest in efficiency-enhancing process innovations.

The Administration's approach represents a comprehensive solution to a problem that includes, but also extends beyond, the concern with joint R&D ventures. We strongly believe that nothing less than such a comprehensive approach is necessary to foster the optimal level of investment in technological innovation. Moreover, our approach toward joint R&D ventures avoids certain problems that would arise under the three joint R&D bills presently pending before this Committee.

C. The Approaches Taken in S. 568, S. 737, and S. 1383 Raise Serious Problems That Are Not Present in the Approach Advocated by the Administration

The Administration developed its approach relating to joint R&D ventures after careful analysis of the benefits and detriments of the three bills currently pending before this Committee. Those bills appropriately seek to reduce the uncertainty that now surrounds the application of the antitrust laws to joint R&D ventures. While the bills go far towards achieving certainty, we believe that the modifications embodied in our approach would be an improvement over the three bills. Our modifications are directed at two problems. First, two of the bills would transform the Department of Justice from its traditional role as enforcer of the antitrust laws to a regulatory bureaucracy. Second, two of the bills would replace the existing antitrust standard for distinguishing legal from illegal joint R&D ventures with standards that employ arbitrary, and at times anticompetitive criteria. The Administration's approach would avoid these problems and at the same time would be as effective in eliminating the adverse deterrent effect that the antitrust laws currently may have on joint R&D activity.

S. 568 and S. 1383 each involve a procedure under which the Attorney General would be required to certify that applicant joint R&D ventures satisfy the criteria established under the bills. In its role as certifier, the Department would be required to oversee the structure and conduct of all joint R&D ventures, regardless of their anticompetitive potential. This would unnecessarily interfere with numerous innocuous joint ventures. Furthermore, it would entail the expenditure of substantial Departmental resources that could be better spent investigating and prosecuting anticompetitive behavior. The Administration's approach rejects the certification route and instead would allow the Department to target its limited resources against joint R&D activities that the Department has reason to believe are anticompetitive.

Next, S. 568 and S. 737 would abandon the antitrust analysis that traditionally has been employed to determine whether a particular joint R&D venture is anticompetitive. However, it is extremely difficult, if not impossible, to imagine statutory criteria that would be as effective as traditional antitrust analysis in differentiating procompetitive from anticompetitive joint R&D ventures. The bills would replace that traditional standard with an immunity based on certain wooden and largely irrelevant criteria.

A number of those criteria are inadequate to distinguish between procompetitive and anticompetitive joint R&D ventures. For example, under S. 737 market shares would always be calculated on the basis of worldwide sales of a product. While producers throughout the world can effectively compete in the United States for sales of certain products, foreign producers are often unable to compete in the United States because of transportation costs, protectionist barriers, or other reasons. Treating the markets for all goods as worldwide in scope, regardless of the competitive reality, is therefore arbitrary and could result in antitrust immunity for joint ventures that have significant anticompetitive effects.

Of even greater concern to the Department of Justice are those criteria that would actually encourage anticompetitive joint ventures and destroy existing incentives to innovate. Both S. 568 and S. 737 seem to be premised on the notion that it is necessarily procompetitive and beneficial to give all United States firms open access to joint ventures and to obligate joint ventures to license their discoveries to non-member United States competitors after a limited period of time (three years in S. 737 and six years in S. 568). To the contrary, open access and mandatory licensing will impair rather than promote competition. The larger the percentage of market competitors participating in a venture, the greater the venture's anticompetitive potential. It is only under very rare economic conditions that the exclusion of competitors from a joint venture and its fruits becomes a concern.

The mandatory licensing provisions contained in the bills, moreover, would diminish existing incentives for innovation. As I explained earlier, the system of exclusive rights under the intellectual property laws provides the means by which inventors and innovators can obtain a financial reward for their R&D efforts and thereby establish a strong incentive to invest in R&D. The provision for mandatory licensing in the bills would be a de facto repeal of the intellectual property laws and would in the long run reduce the flow of private resources into R&D.

Furthermore, when firms know that they will have access to their competitors' successful R&D efforts, their own incentive to invest in R&D may be reduced significantly. They may choose instead to "free ride" on the efforts of other firms. While the ride would not be entirely "free" because of the required payment of a "reasonable" royalty, the competitors will be assured of access to the invention, and access is often critical.

Mr. Chairman, that concludes my prepared remarks. I would be happy to answer any questions you or other members of the Committee may have.

Senator MATHIAS. Our next witnesses will appear as a panel: Admiral Inman, Mr. William C. Norris, Mr. Peter F. McCloskey, Mr. Thomas Leary.

As the panel is assembling, let me recognize the Senator from Kansas.

Senator DOLE. Thank you, Mr. Chairman. I am sorry to interrupt, but I will just take 1 minute. We have a hearing going on down the hall where I am presiding. But I did want to express my appreciation for the scheduling of these hearings on various legislative proposals which would clarify the status of joint research and development projects under the antitrust laws of the United States.

I regret that I cannot be present, but we have a hearing on tax proposals down the hall, since the Budget Committee has indicated we should raise $73 billion.

I know that Senator Mathias has introduced legislation addressing the problems which exist, as have a number of other Senators, and we are going to be considering all the legislation.

Like others of my colleagues, I have been examining the need for legislation, and yesterday introduced a bill which specifically addresses the antitrust issues which are of concern. The details of the bill are described in a statement which I made and which would be made part of the record.

So, I would just want to indicate to those witnesses who are appearing as well as the chairman that many of us share your concern and interest in this matter and we want to work with you on it.

Senator MATHIAS. Well, we welcome your participation, and I think it will be extremely helpful to have your active involvement. Thank you very much, Senator Dole.

I might take the opportunity, since Senator Dole has made his statement, to say that we have statements from the Senator from Massachusetts, Mr. Tsongas, and the Senator from Texas, Mr. Bentsen, which I will submit for the record, and they will all be included as part of the record.

[The following was received for the record:]

STATEMENT OF SENATOR ROBERT DOLE

"NATIONAL JOINT RESEARCH AND DEVELOPMENT POLICY ACT"

MR. PRESIDENT. I AM PLEASED TO INTRODUCE TODAY THE "NATIONAL JOINT RESEARCH AND DEVLOPMENT POLICY ACT OF 1983." THIS LEGISLATION IS DESIGNED TO ENCOURAGE AND PROMOTE JOINT RESEARCH AND DEVELOPMENT VENTURES BY PROVIDING LIMITED ANTITRUST PROTECTIONS TO THOSE VENTURES WHICH MEET THE BILL'S SIMPLE DISCLOSURE REQUIREMENTS.

JOINT RESEARCH AND DEVELOPMENT VENTURES PLAY AN IMPORTANT PROCOMPETITIVE FUNCTION. RESEARCH AND THE DEVELOPMENT OF NEW IDEAS INTO MARKETABLE PRODUCTS, SERVICES, OR TECHNOLOGY ARE EXPENSIVE AND SPECULATIVE UNDERTAKINGS, THE PROFITS OF WHICH MAY NOT EMERGE FOR SEVERAL YEARS. AS A RESULT, JOINT VENTURES, WHICH PERMIT FIRMS TO POOL THEIR RESOURCES AND SHARE THE RISKS, CAN LEAD TO IMPORTANT ADVANCES IN NEW TECHNOLOGY, WHICH OTHERWISE WOULD NOT BE ACHIEVED BECAUSE OF EXCESSIVE RISK OR COST TO THE INDIVIDUAL FIRM. JOINT R & D VENTURES CAN, IN PARTICULAR, ENABLE SMALLER BUSINESSES TO STAY COMPETITIVE IN NEW OR TECHNOLOGICALLY EVOLVING MARKETS, AND STIMULATE PRODUCTIVITY GROWTH, ENABLING THE UNITED STATES TO MAINTAIN LEADERSHIP IN WORLD TRADE.

DESPITE THESE PROCOMPETITIVE BENEFITS, MANY BUSINESSES, IRONICALLY, MAY BE RELUCTANT TO ENGAGE IN JOINT R & D ACTIVITIES OUT OF FEAR OF AN ANTITRUST CHALLENGE.

AS A GENERAL RULE, COURTS HAVE CAREFULLY ANALYZED AND WEIGHED THE RISKS AND BENEFITS OF SUCH VENTURES IN RESOLVING ANTITRUST CHALLENGES. NEVERTHELESS, A FEW EARLIER CASES SEEM TO IMPLY THAT JOINT VENTURES MIGHT BE VIEWED AS UNLAWFUL, PER SE, UNDER THE ANTITRUST LAWS. THUS, A PERCEPTION OF UNCERTAINTY AS TO THE LAWFULNESS OF SUCH VENTURES MAY STILL LINGER.

SECOND, IF A COURT WERE TO DETERMINE THAT A JOINT RESEARCH AND DEVELOPMENT VENTURE VIOLATED THE ANTITRUST LAWS, THE CONSEQUENCE COULD BE THE IMPOSITION OF MANDATORY TREBLE DAMAMGES IN A PRIVATE SUIT, OR EVEN POSSIBLE CRIMINAL LIABILITY. FACED WITH LINGERING UNCERTAINTY ABOUT THE APPROPRIATE LEGAL STANDARD TO BE APPLIED TO JOINT R & D VENTURES, COUPLED WITH THE POSSIBILITY OF SUCH SEVERE PENALTIES, THE SOUND BUSINESS JUDGMENT OF MANY FIRMS MAY STRONGLY SUGGEST THAT SUCH VENTURES SHOULD NOT BE UNDERTAKEN.

THIS BILL WOULD ADDRESS THESE PROBLEMS BY PROVIDING THAT JOINT VENTURES FORMED TO ENGAGE IN JOINT RESEARCH AND DEVELOPMENT PROGRAMS SHALL NOT BE DEEMDED UNLAWFUL, PER SE, UNDER THE ANTITRUST LAWS. IT SHOULD BE EMPHASIZED THAT THIS PROVISION WOULD NOT PERMIT ANTICOMPETITIVE BEHAVIOR TO ESCAPE CONDEMNATION. RATHER, IT WOULD SIMPLY OBLIGE THE COURTS TO CONSIDER THE ACTUAL ECONOMIC EFFECT OF THE VENTURE'S ACTIVITIES BEFORE RULING ON THEIR LEGALITY UNDER THE ANTITRUST LAWS.

THE BILL WOULD ALSO PROVIDE IMMUNITY FOR JOINT R & D VENTURES FROM CRIMINAL LIABILITY UNDER THE ANTITRUST LAWS, AND LIMIT RECOVERY IN PRIVATE CIVIL SUITS TO ACTUAL DAMAGES. UNLIKE OTHER PROPOSALS, THIS BILL WOULD NOT REQUIRE A JOINT VENTURE TO MEET DETAILED AND COMPLEX SELF-CERTIFICATION REQUIREMENTS, NOR TO UNDERGO CUMBERSOME REGULATORY REVIEW PROCEDURES. RATHER TO AVAIL ITSELF OF THESE LIMITED ANTITRUST PROTECTIONS, THE VENTURE WOULD SIMPLY HAVE TO FILE A DISCLOSURE STATEMENT WITH THE JUSTICE DEPARTMENT UPON FORMATION, AND SUBMIT ANNUAL REPORTS UPDATING, WHERE NECESSARY, THE INFORMATION REQUIRED IN THE STATEMENT.

I AM INTRODUCING THIS PROPOSAL BECAUSE I BELIEVE THAT JOINT R & D VENTURES CAN PLAY A UNIQUE AND CRITICAL ROLE IN THIS COUNTRY'S CONTINUED ABILITY TO MAINTAIN LEADERSHIP AND COMPETITIVENESS IN THE PRODUCTION OF NEW TECHNOLOGY. OUR ANTITRUST POLICY SHOULD ENCOURAGE, NOT RETARD, THIS VITAL ACTIVITY.

ON THE OTHER HAND, I AM SENSITIVE TO THE CONCERN THAT JOINT R & D VENTURES CAN ASSUME A VARIETY OF FORMS AND THAT IT IS IMPOSSIBLE TO PREDICT IN EACH AND EVERY CASE THAT THEIR PRO-COMPETITIVE BENEFITS WILL OUTWEIGH POSSIBLE ANTICOMPETITIVE HARM. FOR EXAMPLE, INDUSTRY-WIDE RESEARCH PROJECTS THAT INCLUDE MOST OR ALL FIRMS IN A LINE OF COMMERCE MAY PRESENT SERIOUS ANTITRUST PROBLEMS. THUS, UNLIKE OTHER PROPOSALS, THIS LEGISLATION DOES NOT SEEK TO GRANT TOTAL ANTITRUST IMMUNITY, NOR WOULD IT FORECLOSE AN INJURED PARTY FROM RECOVERING ACTUAL DAMAGES.

MR. PRESIDENT. UNCERTAINTIES AND MISPERCEPTIONS ABOUT THE APPLICATION OF ANTIRUST LAW TO JOINT R & D VENTURES MAY BE DISCOURAGIN INVESTMENT IN JOINT PROJECTS WHICH COULD LEAD TO IMPORTANT ADVANCEMENTS IN NEW TECHNOLOGY. I HOPE THE CONGRESS WILL ACT SWIFTLY TO REMEDY THIS ANOMOLOUS SITUATION BY PASSING THE LEGISLATION I AM INTRODUCING TODAY.

Senator Paul Tsongas

Testimony before the Senate Judiciary Committee
Hearing on Joint Research and Development Ventures.
June 29, 1983

Mr. Chairman, U.S. technological leadership is eroding. The Japanese have launched the most serious challenge to U.S. industrial competitiveness that we have ever faced. The Japanese have learned to capitalize on the fruits of scientific research more effectively than we do despite the fact that much of that basic R & D is ours. Most importantly, the Japanese have used technology to dramatically increase the quality and productivity of their industrial production.

Anerican firms are no longer merely competing among themselves. They must compete in an international marketplace. Many high tech companies must compete especially against Japanese enterprises that have the support of the Japanese government, Japanese banks and Japanese labor all acting in concert. The odds are thus stacked against American business. This changing reality ought to prompt a revision of policies that hamper our ability to compete.

R & D is critical to technological innovation, industrial competitiveness, increased productivity and economic growth. We must expand the extent and diversity of U.S. R & D to maintain our leadership in basic research and to launch new efforts in manufacturing technology.

There a variety of factors that discourage U.S. firms from conducting R & D at levels that reflect the social rate of return cf such investments. R & D is often an expensive and highly uncertain investment. Support of basic research often yields benefits beyond the time horizon of most companies. Industry tends to focus on incremental product improvements that can return quick profits. The scope of research that a high tech firm needs to be involved with to support product and process innovation is growing beyond the financial capacity of individual firms. In areas of rapidly changing technology such as computers and microelectronics, very expensive large scale R & D projects also beyond the capacity of individual firms, are necessary. Industries composed of small firms or in declining sectors frequently spend very little on R & D and thus rarely achieve the innovations needed to compete. Improvements in process and production technology - such as automation, machinery, and chemical processing - are often important to an industry as a whole, but too costly and risky for a single firm to pursue.

One could conceive of trying to develop a massive federal R & D program to support industrial objectives but such efforts are often best managed in the private sector if possible. Industrywide, joint research and development ventures can surmount some of these barriers. In joint R & D ventures individual firms share risks, pool resources for large projects and undertake R & D on a scale that maximizes efficiency. Joint R & D ventures also can combine complementary resources and talents of different firms to accelerate innovation.

The importance of joint R & D ventures in the U.S. is underscored by efforts undertaken in Japan. They have used joint R & D efforts to accelerate technological development in a number of key areas. One is the very large scale integration project in semi-conductors. Another is the fifth generation computer project. In Japan such joint R & D projects are exempt from antimonopoly laws.

In the U.S. joint R & D ventures can pose serious antitrust problems. Ambiguities in the law and vagaries of enforcement create an uncertain legal environment that can expose a joint R & D venture to Federal or State antitrust action, as well as to private suits. The perceived risk of being embroiled in an expensive and lengthy court suit is widely regarded as acting to discourage the formation of joint R & D ventures.

In 1980, the Justice Department issued guidelines on the legality of joint R & D ventures and instituted a review procedure for firms contemplating joint R & D ventures. But the Justice Department's procedure is inadequate. It provides only a statement of present enforcement intentions and does not preclude eventual action that could be retroactive nor private suits. Though the Justice Department procedure provides substantial guidance, it still leaves uncertainty.

In another epoch when the U.S. economy was relatively insulated from outside competition, the fear of antitrust suits and treble damages served to beneficially check corporate behavior. But changing circumstances of international competition have outpaced our current antitrust policy. The uncertainty surrounding antitrust action now tends to inhibit even limited cooperation among the firms in ventures that can help the U.S. become more competitive internationally. I believe that we should take steps to clarify antitrust law to reduce uncertainty.

The Judiciary Committee has before it several proposals and bills for clarifying and modifying the law to encourage the formation of joint R & D ventures. I would leave it for the Committee and experts in antitrust law to craft an effective and workable mechanism. The bills certainly contain the necessary raw materials.

In developing such a mechanism I believe the Committee should act narrowly in clarifying the law for joint R & D ventures and not get bogged down in efforts to overhaul all antitrust laws. The Committee need not and should exempt such ventures from antitrust laws but should facilitate the application of such laws and clarify the status of such ventures under existing antitrust law. The lines defining what is an acceptable joint R & D venture and what is not should be drawn clearly so that joint R & D ventures may be appropriately structured.

Of course, clarifying antitrust law is not the whole answer to restoring U.S. competitive strength in our basic industries or preserving it in our growing high tech industries. But it is an important element in an overall national policy. Joint R & D ventures can be an important means for enhancing our nation's technological base. We should enact legislation to clarify antitrust laws and thus remove a significant barrier to their formation.

PREPARED STATEMENT OF SENATOR LLOYD BENTSEN

Mr. Chairman, I want to thank you for the opportunity to submit testimony to the Judiciary Committee this morning. The subject of this morning's hearing—the extent to which we need to modify our antitrust laws to facilitate on joint research and development in order to maintain our industrial competitiveness—comes at a crucial time.

Our major industries no longer dominate the world's economy the way they once did. Virtually across the board in industry after industry, U.S. market shares are shrinking as new, productive firms abroad offer us stiff competition. As a result, we must examine more closely those restrictions we place on our firms—particularly those who must compete with foreign firms whose home governments actively seek to encourage growth by instituting protective trade policies and by subsidizing particular growth industries. I am concerned that our current antitrust restrictions on joint research and development ventures may create an undue barrier to growth and force our firms to play on a tilted international trade playing field.

Some statistics place the need to boost our Nation's R&D in perspective. Our major trading competitors, Japan and Germany, devote substantially greater portions of their GNP than we do to nondefense R&D. In 1978, for example, according to a Congressional Research Service study performed at my request, we devoted 1.65 percent of our GNP to civilian R&D. In that same year, Japan devoted 2.09 percent and Germany devoted an even higher 2.26 percent. In addition, those nations may well benefit more from their R&D investments because these governments readily permit companies to pool resources and conduct joint R&D programs. They target research grants and loans to selected private firms and consortiums, as well, in order to explore and develop tomorrow's market. And, as this Committee knows well, new markets translate directly into lower costs and more jobs.

These aggressive foreign R&D programs and the inability of U.S firms to pool R&D efforts in a similar fashion cuaused me to introduce S. Res. 163 on June 1983. It expressed the Sense of the Senate that the President should determine the extent to which antitrust laws of the United States hinder American industry's efforts to maintain needed levels of capital investments and to conduct appropriate levels of research and development.

The need for action on this bill or other similar legislation in this area is emphasized by the decision of American business leaders to seize the initiative in at least one crucial area of joint R&D activity which could reshape our future. With approval for the time being from the Justice Department, 13 electronics companies recently joined together to create the Microelectronics and Computer Technology Corporation (MCC). This is a research and development joint venture of the participating firms, directed by Admiral Bobby R. Inman, and designed to discover new procedures and production techniques of general applicability to the member electronic firms and the industry generally.

There is ample precedent abroad for such a joint effort. Our competitors pool their resources, and I believe that we can no longer afford the wasteful luxury of duplicative research efforts when our collective standard of living and employment may depend upon great R&D efficiency.

MCC represents a cooperative effort on the part of its members to forge a path through the frontier of high technology. Although the original investors will benefit first from MCC's discoveries, the electronics industry will benefit, as well, because any new technologies which are developed will be licensed to other companies. I share the hope of William Norris, the Chief Executive Officer of Control Data, who originally conceived of the idea of creating the venture, that MCC "will become a significant national technology resource."

MCC has received Justice Department approval for its organization. But I believe that the Congress still must act on the antitrust questions raised by the MCC example. We must make certain that MCC does not become embroiled in private treble damages antitrust lawsuits, for example, in future years when the current Attorney General and his staff may no longer be in office. We must make certain that MCC's existence itself is not always held hostage to a change in Justice Department policy or personnel. And we must make certain that other similar R&D joint ventures by major firms in the same industry can be established as long as they meet reasonable standards for competition in other areas. Because he law today is unclear regarding joint R&D ventures, some companies, particularly small ones which could not afford the legal expenses to defend themselves, have declined to participate in joint ventures. If we can clarify the legal antitrust boundaries for joint R&D ventures, we will ensure the status of MCC and create a new legal environment in which similar joint ventures can be created.

I believe that S. 737, a bill introduced by Senator Mathias, to allow businesses jointly to perform research and development, helps clear up much of the present legal ambiguity surrounding ventures like MCC. The bill establishes standards for organizing joint research and development ventures which are designed to prevent collusive, anticompetitive behavior. If they are met, then the venture would be presumed to be lawful from an antitrust perspective. According to standards set out in the bill, a project must be research-oriented, and must not involve manufacturing and marketing. It must be open to all firms on an equal basis. It contains a market share standard, as well. Any American firm participating in such a proposed venture must first obtain the approval of the Attorney General if it accounts for 25 percent of total worldwide industry sales during the preceding three years, and its participation would cause the collective sales of all the participants in the group to exceed 50 percent of the world market.

S. 737 goes a long way toward clarifying the murky legal status of joint R&D ventures. And it should be enacted. There are several questions it raises, however, which the Committee may want to examine in further detail. The market share test, for example, in S. 737 could conceivably impede the development of some desirable R&D projects. Pools of key engineering and scientific talents even in a nation the size of ours are small. The success of a proposed venture may well depend upon the participation of even a single particular individual employed by some large company—a company otherwise ineligible for participation in the joint venture. In addition, the market share test may be overly rigid. As drafted, it refers to the percentage of all products developed by a particular company, when the prospective joint R&D venture may only deal with a small part of that company's product lines. Under the provisions of S. 737, participants in a joint venture will maintain exclusive access to any developed technologies for only three years. After that time, licenses will be made available by the venture to any other American firm for a reasonable fee. For that reason, I believe that the bill's certification process should not be too restrictive because in the long run all are likely to benefit.

In summary, S. 737 is a good starting point. It contains the heart of what I—and I believe MCC officials—believe is a necessary clarification of our permitted laws governing joint R&D ventures. Such ventures are permitted now. But the conditions when such ventures are not subject to antitrust action are vague and unspecified—especially when firms with substantial market shares are participants. S. 737 with modification will clear up that uncertainty. It will remove the risk of unexpected expost legal action. It will encourage many more joint ventures along the lines of the promising MCC entity. And for that reason I urge this Committee to move expeditiously in marking up and reporting S. 737 to the full Senate for prompt action. The time is long past when we should begin to correct the tilt against our Nation in international trade. And encouraging more joint R&D ventures on the MCC model is one good way to start the long haul back to balanced international trade relations.

Senator SPECTER. Mr. Chairman, I would like leave to submit my opening statement as well for the record.

Senator MATHIAS. Without objection, Senator Specter's statement will also be included for the record.

[The following was received for the record:]

PREPARED STATEMENT OF SENATOR ARLEN SPECTER

The vigorous enforcement of the antitrust laws is essential for the protection of competitor and consumer alike. At the same time, we should make certain that those laws are not misapplied to stifle the ability of American industry to compete in today's international marketplace. As an original cosponsor of S. 737, I believe that S. 737 strikes the proper balance in this regard by clarifying the antitrust laws to ensure that joint research and development ventures which do not have anticompetitive consequences are spared costly and time consuming court challenges.

Senator MATHIAS. Now, gentlemen, we have spent more time this morning than we had anticipated on the earlier witnesses and we need to conclude this by around noon. So, I would ask you to summarize your statements in about 5 minutes, and then that will leave us time for some questions.

Do you have any preference as to the order?

STATEMENT OF A PANEL CONSISTING OF ADM. B. R. INMAN, CHAIRMAN AND CHIEF EXECUTIVE OFFICER, MCC, ARLINGTON, VA.; WILLIAM C. NORRIS, CHAIRMAN, CONTROL DATA CORP., MINNEAPOLIS, MINN., ON BEHALF OF THE AMERICAN ELECTRONICS ASSOCIATION, ACCOMPANIED BY STEVE OLSON, COUNSEL, CONTROL DATA CORP.; PETER F. McCLOSKEY, PRESIDENT, ELECTRONIC INDUSTRIES ASSOCIATION; AND THOMAS B. LEARY, ON BEHALF OF THE NATIONAL FOREIGN TRADE COUNCIL

Admiral **Inman**. Senator Mathias, if I may defer to Mr. Norris, since he is the founder of MCC in any case, and in his statement he covers it, I would simply submit my statement for the record and stand by to answer questions.

Senator **Mathias**. You can see an experienced congressional witness.

Mr. Norris?

Mr. **Norris**. Mr. Chairman, members of the committee, as you know, I am chairman of Control Data. We are headquartered in Minneapolis. I have with me today Mr. Steve Olson, Control Data associate counsel.

I am appearing on behalf of the American Electronics Association. AEA represents over 2,000 member companies and I am very pleased to be here on their behalf. I wish to thank the committee for the opportunity.

The United States today faces severe challenges to its technological leadership and its international competitive position. Meeting these challenges will require many actions. However, I believe that the single most important one is a vast increase in technological cooperation which S. 737 can help to stimulate.

Our country's once strong international position in technology has been steadily eroding because other nations have taken a number of steps to accelerate their development and application of advanced technology.

Japan has made great progress in advancing and exploiting technology in targeted industries. The Japanese Government has promoted cooperation among industry members at the base technology level as a key strategy for success. And this strategy, particularly as implemented in the areas of microelectronics and computers, poses an ominous threat that has serious implications for virtually all modern industries in the United States and, of course, for our national security as well.

An adequate response will require many and varied actions. However, by far the greatest and most rapid progress can be achieved by increasing our efficiency in developing and applying technology. And given the scarcity of available resources, both human and financial, achievement of such efficiency will require a vast increase in technological cooperation.

Furthermore, the United States is suffering from a wasteful duplication of research and development efforts, and this is especially valid in light of our critical shortage of competent science and engineering talent.

Control Data has been a pioneer in advocating and practicing broad-based cooperation for years. Our experience over the past 10 to 15 years has demonstrated that such an approach not only will work, but that it is essential to the maintenance of a vigorous, competitive environment.

Most recently, Control Data was the catalyst in the formation of a research and development joint venture in the area of microelectronics and computer science, and this venture, known as Microelectronics and Computer Technology Corp., MCC, is a cooperative effort by 13 American computer and semiconductor companies to develop a broad base of fundamental technology for use by members, who will in turn each add their own value and continue to compete with products and services of individual conception and design.

Research consortia such as MCC will promote increased innovation, improve productivity by enabling participants to take advantage of the economies of scale, and foster competition by accelerating the transfer of technology throughout the economy. And I emphasize this particularly for small business.

MCC and small ventures in other industries can provide a meaningful private sector response to the dual challenges of research shortages and foreign-government-led industrial policies.

Now, there is an urgent need for Congress to act to clear away the uncertainties in the interpretation and application of antitrust laws as they relate to R&D joint ventures. The fear of inadvertently violating U.S. antitrust law and the threat of treble damages are a significant deterrent to undertaking collaborative R&D.

Business executives receive legal advice fraught with uncertainty, for the ultimate legality or illegality of their actions, they are told, can only be conclusively determined by litigation, which we know is a complex and expensive and totally non-productive exercise.

The confusion under current law is greatly compounded by the fact that even if the Justice Department should agree that an R&D joint venture passes muster, that determination does not bind future administrations. There are also a lot of private lawyers out there ready and willing to disagree.

For example, as I am sure many of you are aware, a San Francisco plaintiff's antitrust lawyer, Joseph Alioto, has written each MCC shareholder stating flat out that he thinks that MCC is illegal. Is it any wonder that businesspersons are deterred from joint venture research activities?

Mr. Chairman, it is time to correct this problem, and in order to bring about widespread cooperation we need a change in the tenor of current laws, from laws that sometimes permit cooperation to legislation that encourages it. And this, of course, is the purpose of S. 737.

It embodies a comprehensive and effective approach which we strongly support, and it does not change, but seeks to clarify, U.S. antitrust laws. Under its provisions, Congress would prescribe statutory criteria for lawfully organizing and conducting joint R&D ventures which, if met, would shield a venture from antitrust attack.

Under this self-certification approach, a set of objective standards or rules would be enacted and those companies desiring to cooperate in R&D could then plan and implement their activities accordingly. This would remove existing uncertainty because companies would know in advance how to organize and conduct their R&D ventures.

If a venture complies with the standards, its activities would not be subject to either criminal or treble damage liability. Congress will have declared such compliance to be presumptively lawful. Of course, activities falling outside of the standards would remain fully subject to the dual deterrents of governmental and private damage actions.

And we believe this approach is preferable over that contained in those bills which would require any venture to be certified by the Justice Department. We do not think it either necessary or desirable that another bureaucracy be created to solve this problem. We would prefer a law that the private sector could itself understand and apply.

Further, to be successful, such ventures must remain fluid, with strategic decisions constantly reviewed and redirected in light of the experience provided by the process. A rigid certificate authorizing certain described venture activities is wholly inappropriate to this environment.

We urge this committee and your colleagues in the Senate to act favorably on S. 737, and consider adding these other points. We believe that this will make a significant contribution to fostering increased research and development, and therefore, to enhancing the international competitiveness of the United States. Thank you.

Senator MATHIAS. Thank you, Mr. Norris.

[The prepared statements follow:]

Statement of
William C. Norris
Chairman, Control Data Corporation

before the

Senate Judiciary Committee

June 29, 1983

Summary

- The United States today faces severe challenges to its technological leadership and international competitiveness. Meeting these challenges will require many actions. However, I believe that the single most important is a vast increase in technological cooperation, which S.737 can help stimulate.

- The U.S. is suffering from a wasteful duplication of research and development efforts. For every corporation to rediscover what others have already learned is wasteful -- not only to each company -- but also to society. This is especially valid in light of our critical shortage of competent scientific and engineering talent.

- We thus have an environment which demands increased cooperation, but where many companies interested in cooperation are deterred by confusion and uncertainty.

- S.737 does not change, but seeks to clarify, U.S. antitrust laws. Under its provisions, Congress would prescribe statutory criteria for lawfully organizing and conducting joint R&D ventures which, if met, would shield a venture from antitrust attack. Under this "self-certification" approach, a set of objective standards or rules would be enacted, and those companies desiring to cooperate in R&D could then plan and implement their activities accordingly.

- We also support provisions in related bills which limit anti-trust recovery in the R&D area to single damages, not treble; and which allow anti-trust defendants to recover attorneys' fees when they prevail.

AEA **American Electronics Association**
1612 K Street, N.W., Washington, D.C. 20006

Mr. Chairman and members of the committee: My name is William C. Norris, Chairman of Control Data Corporation, which is headquartered in Minneapolis, Minnesota. With me is Steve Olson, Control Data Associate Counsel.

I am appearing here today on behalf of the American Electronics Association ("AEA"). AEA represents over 2,100 member companies nationwide, and over four hundred financial, legal and accounting organizations which participate as associate members. AEA encompasses all segments of the electronics industries including manufacturers and suppliers of computers and peripherals, telecommunications equipment, defense systems and products, instruments, semiconductors and other components, software, research, and office systems. AEA companies account for 63% of the worldwide sales of the U.S. based electronics industry.

I wish to thank the Committee for the opportunity to be here today. The United States today faces severe challenges to its technological leadership and international competitive position. Meeting these challenges will require many actions. However, I believe that the single most important one is a vast increase in technological cooperation, which S.737 can help to stimulate. In the few minutes available to me this morning, I would like to comment on both the need for legislation and the form it should take.

1. THE NEED -- REQUIRED BY A CHANGED ENVIRONMENT

Our country's once strong international position in technology has been steadily eroding because other nations have taken a number of steps to accelerate their development and application of advanced technology.

In just a few short years, the U.S. position in microelectronics has gone from one of unquestioned and seemingly unassailable leadership to one of considerable vulnerability. We are now in second place in worldwide shipments of a particular advanced microelectronic component -- the 64 thousand-bit random access memory chip -- and a report by a government research laboratory raises the possibility that the U.S. may be dependent on Japan for super computers by the end of this decade. Moreover, almost two years ago Japan sponsored an international conference to announce its intention to become the world leader in computing by 1990.

As these developments show, Japan has made great progress in advancing and exploiting technology in targeted industries. The Japanese Government has promoted cooperation among industry members at the base technology level as a key strategy for success. This strategy, particularly as implemented in the areas of microelectronics and computers, poses an ominous threat that has serious implications for virtually all modern industries in the U.S., and for our national security as well. This threat is accentuated by the pervasive and rapidly growing application within all industries of these base technologies.

An adequate response will require many and varied actions. However, by far the greatest and most rapid progress can be achieved by increasing our efficiency in developing and applying technology. And given the scarcity of available resources -- both human and financial -- achievement of such efficiency will require a vast increase in technological cooperation. Yet intra-industry technological cooperation is a badly neglected topic in the ongoing national debate about U.S. industrial policy.

Furthermore, the U.S. is suffering from a wasteful duplication of research and development efforts. I believe the use of basic knowledge by one party should never preclude its use by another. For every corporation to rediscover what others have already learned represents waste -- not only to each company -- but also to society. This is especially valid in light of our critical shortage of competent scientific and engineering talent.

Control Data has been a pioneer in advocating and practicing broad-based cooperation for years. Our experience in technological cooperation over the past ten to fifteen years has demonstrated that such an approach not only will work -- but that it is essential to the maintenance of a vigorous competitive environment.

Most recently, Control Data was the catalyst in the formation of a research and development joint venture in the area of microelectronics and computer science. This venture, known as Microelectronics and Computer Technology Corporation (MCC), is a cooperative effort by American computer and semiconductor companies to develop a broad base of fundamental technologies for use by members who will, in turn, each add their own value and continue to compete with products and services of individual conception and design. Participating companies so far include Advanced Micro Devices, Allied Corporation, Control Data, Digital Equipment Corporation, Harris, Honeywell, Martin-Marietta, Mostek, Motorola, National Semiconductor, NCR, RCA and Sperry.

Research consortia such as MCC will promote increased technological innovation; improve productivity by enabling participants to take advantage of economies of scale; and foster competition by accelerating the transfer of technology throughout the economy and particularly to small business. MCC and similar ventures in other industries can provide a meaningful private-sector response to the dual challenges of resource shortages and foreign government-led industrial policies.

2. ANTITRUST LEGISLATION -- TO ENCOURAGE R&D COOPERATION

There is an urgent need for Congress to act to clear away the uncertainties in the interpretation and application of antitrust laws as they relate to R&D joint ventures. The fear of inadvertently violating U.S. antitrust laws and the threat of treble damages are a significant deterrent to undertaking collaborative R&D.

Cooperative R&D, from an antitrust standpoint, falls under what the lawyers call "the rule of reason" -- where the question of legality or illegality depends on the interrelationship of a variety of circumstances. In this respect, it is unlike activities such as price-fixing which are, and would continue to be, per se illegal.

In cooperative R&D legality cannot be conclusively established at the inception of an R&D venture, since one's view of the "circumstances" surrounding a venture will vary according to the weight given to each of its elements. Moreover, the view inevitably reflects the timing and the predilections of the analysts. Business persons receive legal advice fraught with uncertainty -- where the ultimate legality or illegality of their actions, they are told, can only be conclusively determined by litigation -- a complex and expensive and totally non-productive exercise.

We thus have an environment which demands increased cooperation, but where many companies interested in cooperation are deterred by confusion and uncertainty --- where a company's go/no-go decision to join a cooperative R&D venture is based on the hope that the judgement of its lawyer will ultimately be sustained by a majority of the legal and economic theorists who will eventually examine its conduct with the benefit of 20/20 hindsight; where a wrong decision could threaten the survival of the company and where even a right decision still exposes the company to the possible (if not probable) expenditure of weeks or months of executive time and thousands if not millions of dollars in defense costs.

The confusion under current law is greatly compounded by the fact that, even if the Justice Department should agree that an R&D

venture passes muster, that determination does not bind future administrations. There are also a lot of private lawyers out there ready and willing to disagree. For example, as I'm sure many of you are aware, a San Francisco plaintiffs' antitrust lawyer -- Joseph Alioto -- has written each MCC shareholder stating flat-out that he thinks MCC is illegal. Is it any wonder that business persons are deterred from joint research activities?

Mr. Chairman, it is time to correct this problem. In order to bring about widespread cooperation, we need to change the tenor of current laws -- from laws that sometimes permit technological cooperation -- to legislation that encourages it, and this is the purpose of S.737.

S.737, introduced by Senators' Mathias, Hart, Spector, Baucus, and Chafee, embodies a comprehensive and effective approach, which we strongly support. It does not change, but seeks to clarify, U.S. antitrust laws. Under its provisions, Congress would prescribe statutory criteria for lawfully organizing and conducting joint R&D ventures which, if met, would shield a venture from antitrust attack. Under this "self-certification" approach, a set of objective standards or rules would be enacted, and those companies desiring to cooperate in R&D could then plan and implement their activities accordingly. This would remove existing uncertainty because companies would know in advance how to organize and conduct their R&D joint ventures.

The standards or rules reflected in S.737 ensure:

- Open membership to any eligible U.S. firm (Sec.4(b));

- That the venture's joint activities are limited to R&D and that each individual member will be free to conduct its own R&D and exploit venture discoveries as each sees fit (Sec. 4(c));

- Fairness in the way the venture is operated and managed (Sec. 4(d));

- Rapid dissemination and use of venture discoveries, including the requirement that even non-members be licensed after three years (Sec. 4(d)); and,

- Public awareness of the existence of the venture and that it is being operated in conformity with the law's requirements (Sec.5).

If a venture complies with these standards, its activities would not be subject to either criminal or treble damage liability. Congress will have declared such compliance to be presumptively lawful. Of course, activities falling outside of the standards would remain fully subject to the dual deterrents of governmental and private damage actions.

We prefer this approach over that contained in those bills which would require any venture to be "certified" by the Justice Department. We do not think it either necessary or desirable that another bureaucracy be created to solve this problem. We would prefer a law that the private sector could itself understand and apply. Further, to be successful, such ventures must remain fluid, with strategic decisions constantly reviewed and redirected in light of experience provided by the process. A rigid certificate authorizing certain described venture activities is wholly inappropriate to this environment.

But we agree with provisions in other bills which, in recognition of the critical importance of R&D to our country's future, provide that:

- Any rule of reason liability arising out of an activity defined by Congress as "Research and Development " should be limited to actual damages, not treble damages; and

- In any litigation arising out of such activity, attorneys' fees should be awarded to the prevailing party -- defendants as well as plaintiffs.

Mr. Chairman, we urge this Committee, and your colleagues in the Senate, to act favorably on S.737 and consider adding these other points. We believe this will make a significant contribution to fostering increased R&D and therefore to enhancing the international competitiveness of the United States.

Thank you. I would be delighted to respond to any of your questions.

CONTROL DATA

8100 34th Avenue South
Mailing Address/Box 0
Minneapolis, Minnesota 55440

William C. Norris
Chairman of the Board &
Chief Executive Officer

1983 JUL 25 AM 10:45

July 22, 1983

Honorable Strom Thurmond, Chairman
Committee on the Judiciary
United States Senate
Washington, D.C., 20510

Dear Senator Thurmond:

Enclosed are my responses to the questions raised by Senator Hatch included with your letter of July 6, 1983.

I greatly appreciated the opportunity to appear before the Committee. The issue is critical to our country's prosperity and security, and you and Senator Hatch are to be commended for seeking a solution.

Thank you.

Sincerely,

CONTROL DATA CORPORATION

William C. Norris

W. C. Norris

Enclosure

cc: Honorable Orrin Hatch

1. I totally agree that one solution--I believe the best solution--to the antitrust ambiguity problem would be the enactment of clear-cut standards that the private sector could readily understand and apply in setting-up cooperative R&D ventures. This would not only eliminate any need to create another bureaucracy to "review and approve" such ventures, it would also create a fair-handed approach impervious to shifts in antitrust enforcement philosophy so prevalent over the past two decades.

2. I couldn't agree more with the thrust of this question. The ideal solution would preclude the need for bureaucractic review in all cases, but I recognize that perfection may be difficult to achieve in this context.

3. My previous answer "tipped my hand" in responding to this question. I would hope that the situation you describe would be the exception, not the rule. In such cases, I would support an expeditious mechanism that would not only conclusively remove doubt, but preclude a subsequent reopening of the issue.

4. Your question suggests a goal-minimal regulation/ bureaucracy--to which I readily subscribe. To accurately respond, however, I would need a better notion of what you mean by "particularly questionable cases"; my concern is that such an opening could easily become a floodgate.

5. It would depend on the conduct. If the venture were simply being used as a "cover" for price fixing or that sort of thing, I would favor the deterrent effect of treble damages. If, on the other hand, the question of the competitive impact of the behavior is one on which reasonable men could differ, which also typically means there has been no attempt to "hide" it, the penalty of treble damages is clearly too severe.

6. Absolutely. In many instances, private antitrust lawsuits have nothing to do with preserving competition on deterring anticompetitive behavior. Rather, they are little more than "shakedowns", where plaintiffs and unscrupulous lawyers with nothing at stake gamble for huge (and perverse) judicial rewards. Requiring the payment of a successful defendant's fees would deter such frivolous lawsuits. In fact, to avoid situations where plaintiffs would try to avoid being responsible for such fees by simply including allegations in their claim that fall outside the scope of the legislation, I feel that such fees should be recoverable where defendant(s) prevail in any case involving conduct arising out of the R&D cooperation.

Prepared Remarks of Admiral B.R. Inman, USN (Ret.)

Mr. Chairman, I appreciate the opportunity to testify before the Committee today. My prepared remarks will be brief, but I would at the outset like to commend you for starting the process which I hope will end with the enactment of positive legislation removing the current antitrust uncertainty plaguing joint research and development efforts. I also commend Senator Mathias, Senator Specter, Senator Baucus, Senator Glenn, Senator Kennedy and the other Senators who already co-sponsor the several bills that have been introduced on this subject. Although these bills differ in important respects, each one is in its own way a constructive proposal.

In order to maintain the competitive position of United States firms in the international marketplace, it is essential to reduce the unnecessary uncertainties faced by private firms engaged in long-range research and development. As we all know, firms in very few industries are today confined by national borders. The marketplace has become worldwide. This makes it critically important that U.S. firms be given every opportunity to compete on equal terms with their foreign rivals.

For many of our trading partners, joint research and development has become the rule. In addition, the Japanese and European governments have provided substantial support in a variety of ways for R&D efforts in "targeted" industries, including computers and microelectronics.

I do not suggest that our government should be similarly involved in private R&D efforts. In my view, the competitive marketplace is the most efficient mechanism for allocation of the great bulk of scarce R&D resources. The government, however, should not discourage efforts on the part of the private sector to undertake much needed R&D in the most efficient and pro-competitive manner. Unfortunately, the current uncertainty of the application of the antitrust laws to R&D joint ventures unnecessarily discourages important research efforts.

There are several reasons why a joint venture can be the most efficient mechanism to conduct long-range R&D. Several are obvious: costs and risks can be spread and the complementary expertise of different companies can be brought to bear on a particular problem. Perhaps the most important reason is not quite so obvious: the need to bring together the relatively limited pool of engineering and scientific talent--human talent--that is vitally necessary if the research is to have reasonable prospects of success.

If, as is often the case, the dozen or so engineers and scientists who are capable of undertaking the necessary research work for different companies, the antitrust laws may unnecessarily deter the joint R&D. If these companies have a relatively large share of a relevant market, the companies may be unwilling to commit their resources and personnel to the project. The risk that the Department of Justice or a private party will intervene may be too great, particularly when the possibility of huge legal fees and perhaps treble damage liability is involved.

Positive legislation is clearly needed to encourage much needed joint R&D if we are to be truly competitive in the international marketplace. S. 737 is an example of legislation that is most attractive to me. It substitutes clear standards for the uncertain "rule of reason" test that normally applies under existing law. It does not create an additional bureaucratic approval mechanism. Finally, it requires the fruits of research to be made generally available in a manner that allows the companies involved to earn a reasonable return on their investment while ensuring early access by non-participating U.S. companies who can then compete effectively in the marketplace. On balance, S. 737 seems to guarantee that competition will be stimulated, not hampered, by joint R&D.

I do have some suggested changes in S. 737. I will be glad to provide my suggestions to the Committee in advance of the second day of hearings which I understand will be sometime next month.

Mr. Chairman, I again thank you for the opportunity to testify today on this important legislation and I stand ready to answer any questions you or the other members might have.

MCC
MICROELECTRONICS AND
COMPUTER TECHNOLOGY
CORPORATION

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1983 AUG -2 AM 9:43

1 August 1983

Honorable Strom Thurmond, Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Thurmond:

Enclosed are my responses to questions raised by Senator Hatch which you forwarded with your letter of July 6, 1983.

I greatly appreciated the opportunity to appear before the Committee and I am very grateful for your efforts to get this topic on the agenda for legislative action by the Congress this term.

With very best regards.

Sincerely,

Bob Inman

B. R. Inman
President and Chief Executive Officer

Enclosure

Answers of Admiral B. R. Inman, USN (Ret.), to Senator Hatch's Questions Submitted for the Record of Senate Judiciary Committee Hearings on S. 568, S. 737, and S. 1383.

1. One problem that besets R&D joint ventures is the lack of clarity in our antitrust laws as to acceptable R&D joint venture conduct. Could you agree that one solution might incorporate, at least in part, standards which clarify the antitrust laws?

   A. I fully agree that any legislation must set much clearer standards of legality under the antitrust laws for research and development joint ventures and their activities than we have today. Under current law, the enforcements agencies, judges and juries apply the so-called rule of reason to R&D joint ventures and their activities in most circumstances. Application of the rule of reason requires that a number of factors be balanced. These factors include the nature of the research, the market share of the participating firms, and the ability and willingness of the firms to engage in the research individually. There are, however, virtually no benchmarks of legality under any of these factors. I might add that I have great difficulty understanding what bearing some of these factors have on an analysis of the effects of an R&D joint venture on the pace of technological innovation.

   In addition to the uncertainty affecting these individual factors, there is absolutely no settled method for determining their relative importance in a particular situation. I am told that in other circumstances where the rule of reason applies (for example, in the context of marketing restraints), relatively definite standards have been developed by the courts.

   The uncertainty resulting from the current application of the rule of reason to R&D joint ventures and their activities can clearly lead to arbitrary results. This, coupled with possibly huge legal fees and treble damage liability, obviously dampens the willingness of firms to engage in important joint research. Statutory standards which reflect the fact that in almost all circumstances joint R&D is much more likely to stimulate, not retard, competition are necessary.

2. This Administration and the Congress have been attempting to deregulate the business community rather than to increase regulation. Would it not follow that the preferred solution to permitting R&D joint ventures would be the one that eschews bureaucratic red tape in favor of new and clear standards, at least to the extent that such standards provide the necessary clarity in our antitrust laws? Doesn't it make sense to limit Justice Department review to those few questionable cases that require such review?

A. I do not support a certification requirement that gives the Department of Justice a regulatory role. I agree, however, that any uncertainty whether a R&D joint venture is entitled to antitrust protection ought to be resolved in favor of the joint venture until there is a formal determination that the venture does not meet the legislation's standards. I would favor providing a R&D joint venture the option of notifying the Department of its formation or existence. All activities of the venture occurring after notification and before a court determination that a venture does not meet the legislation's standards should not be allowed to form the basis of antitrust damage liability. Of course, a R&D joint venture which is certain that it meets the legislation's standards would have the option not to notify the Department.

3. No matter how precise the antitrust self-certification standards that may be written for R&D joint ventures there will always be some conduct that falls so close to the line of impermissible conduct that there will arise some uncertainty. For instances like this, which may occur with respect to any of the new standards, should legislation provide for some mechanism whereby the uncertainty may be removed (such as DOJ clearance procedure)?

A. I believe that a notification procedure as I described in my answer to Question 2 represents a satisfactory mechanism. It provides the R&D joint venture with protection from antitrust damage liability, but does not prevent the government or a private party from challenging the venture's right to such protection. In addition, a private party may recover damages for antitrust violations occurring subsequent to a determination that the venture does not meet the legislation's standards.

4. If DOJ clearance were somehow limited to particularly questionable cases of R&D joint ventures, is it not true that the amount of regulation/bureaucracy would be minimal?

A. Under a notification procedure, the Department of Justice will need to intervene in only those relatively few cases when it believes the R&D joint venture likely will or has caused competitive harm under the legislation's standards. In effect, the Department's enforcement role will change little, if at all, from what it is at the present time.

5. Whether Congress adopts the clear-standards approach of Senator Mathias, the certification approach of Senator Glenn or of Senator Tsongas, or the notification approach of the Administration, questions will inevitably arise as to whether the conduct of the R&D joint ventures falls within the limits contemplated by these various approaches. If the venture engaging in R&D activity is found to have transgressed those limits and to have violated the antitrust laws, should the venture have to pay treble damages or single damages?

A. In my view, if the R&D joint venture has notified the Department of Justice of its formation or existence, damages should not be recoverable against it for activies occurring before a court determination that the venture does not meet the legislation's standards. If the joint venture (1) fails to notify the Department, (2) does not meet the legislation's standards, and (3) violates the antitrust laws, then only single damages, interest and reasonable attorney's fees should be recoverable.

However, in both the notification and non-notification situations, an injured party should be allowed to recover treble damages for *per se* violations of the antitrust laws unless the violation occurs in connection with the licensing of technology developed by the joint venture. There is absolutely no justification for allowing a R&D joint venture to become a front for a price-fixing or market division conspiracy.

In addition, the Department and private parties should have the right to bring injunctive actions at any time. In these actions, the venture's claims that it meets the legislation's definition of R&D joint venture or that it complies with the bill's substantive antitrust standards can be challenged. If the court determines that the venture does not meet the legislation's definition or standards, it would be subject to damage liability for *future* violations of the antitrust laws. The court could also order the venture to comply with the antitrust laws if it has violated them in the past. If the venture is found to be in compliance, the venture should be able to recover reasonable legal expenses from the plaintiff.

6. If the plaintiff sues a R&D joint venture for having transgressed the limits contemplated in whatever legislation may be enacted and if the court finds that the defendant acted in compliance with the legislation, should not a reasonable attorney's fee be awarded to the defendant not only as a matter of equal treatment with prevailing plaintiffs but particularly to discourage the bringing of unmeritorious suits against persons engaging in an activity which we as a nation should encourage?

A. I firmly believe that the prevailing party -- whether the joint venture or a private party callenging the venture -- should receive its attorney's fees. This will help to discourage unmeritorious claims to the legislation's protections by a venture and frivolous suits challenging the venture's right to antitrust protection.

Senator MATHIAS. Mr. McCloskey?

Mr. MCCLOSKEY. Senator, I am Pete McCloskey, president of the Electronic Industries Association.

Senator MATHIAS. You are the real Pete McCloskey. [Laughter.]

Mr. MCCLOSKEY. Right.

I am very pleased to be here this morning. I think these hearings are extremely important and address a subject that I think is of vital concern to all of us.

I would ask that my testimony be presented for the record as a whole, but I will limit myself to just a few remarks.

Senator MATHIAS. So ordered.

Mr. MCCLOSKEY. First of all, I would subscribe I think almost completely to all of the testimony that I have heard this morning, from Secretary Baldrige to Assistant Attorney General Baxter to Bill Norris, as well.

The international competitive marketplace that we are in today, whether we are solely domestic companies or whether we are selling internationally, is extraordinarily competitive. Our competition abroad has the capability of doing joint research.

For some time, the board of the Electronic Industries Association has looked at this problem and felt very keenly that we should not be hamstringing ourselves by a misperception of the antitrust law. For that reason, we support the basic philosophical concept that there should be available to industry leaders some certainty as to the application of that law with respect to their proposed joint research ventures.

Until Bill Norris' initiative, there had been very few, or practically no joint research attempts. I was privileged to be at the initial founding meeting of MCC some year and 3 or 4 months ago, and I know the apprehension that was felt by the members that were asked to join that venture.

I know that that apprehension was overcome by the concern that they have about the international threat. I would just like to amplify on one or two points. One is on the letter from Joe Alioto, which I think in pertinent part reads:

> As you must know, or at least do know now, a clearance letter from the Antitrust Division is not an authorized grant of immunity from private antitrust enforcement. Neither the courts, the law nor private parties are the least bit bound by Mr. Baxter's philosophy of what the antitrust laws should say or how they should be interpreted.

So, for those who think there is no real danger from private antitrust suits, I think it is obvious that intent expressed from one who has been a successful litigant in the Oakland against National Football League suit is a real threat.

The other is the comments made by Sanford Litvak in his cover letter which issued the broad research guidelines for joint research by the Antitrust Division at the end of the Carter administration. The end of that cover letter says:

> This guide is intended as a general statement of enforcement policy for use by business decisionmakers, lawyers and others. Changes in enforcement policy will, no doubt, occur over time. Because these changes will not always be simultaneously accompanied by changes to the guide, the position stated in the guide should not be regarded as barring any action believed appropriate under the antitrust laws.

So, whether you are looking at it from the private antitrust bar or from the theoretical possibility of Justice's Antitrust Division, I think businessmen have a reasonable ground for concern.

I am very heartened by the legislation that has been introduced and by the full range of that legislation. It seems to me that we have broad philosophical support from Republicans, from Democrats, from liberals, and from conservatives. And it seems to me we ought to be able to fashion legislation that builds on that support and that allows American enterprise to fully compete in the international marketplace.

I would be happy to answer any questions, Senator.

Senator MATHIAS. Thank you.

[Prepared statement follows:]

Electronic Industries Association

Statement of
PETER F. McCLOSKEY, PRESIDENT
Electronic Industries Association
(EIA)

Mr. Chairman and members of the Committee, my name is Peter F. McCloskey. I am the President of the Electronic Industries Association (EIA). I certainly appreciate the opportunity to be here today, and wish to commend you for focusing on this vitally important issue. Legislation which would stimulate joint ventures through clarification of the antitrust laws has been an EIA priority for the last several years. This hearing today will assist greatly in creating a clear understanding of the issues involved, and especially in charting the course for an effective legislative solution to industry's concerns.

With more than 1000 participating companies, EIA is the full-service national trade organization representing the entire spectrum of U.S. companies manufacturing electronic products. These include components, equipment, and systems made for industrial, governmental, and consumer end-uses. In 1982, the electronic industries of the United States generated $126 billion worth of factory sales, exported over $24 billion. We are one of the few manufacturing sectors of the U.S. economy that produced a trade SURPLUS (3.2 billion). These figures are an indication that our industries are advancing and that our products are competitive.

The members of our Association, both large and small, are making an increasingly large contribution to the American economy, both through growing profits and the creation of badly needed jobs. The electronic industries employed 1.6 million Americans in 1982; up from last year despite the bad recession.

The thing that really brings us all here today is the recognition that the global marketplace, in which the United

States finds itself, has created new challenges and has changed the way we think about our position as a world competitor. Our achievements as a nation have been remarkable in so many fields. The challenge, then, is to maintain our preeminence. It would not be appropriate, indeed not advisable, for the United States to blindly adopt the models of its foreign competitors. What we must do, however, is assure that we eliminate any existing barriers to American industry's ability to be productive and innovative.

There is no question that the existing uncertainty as to the scope of the antitrust laws as they relate to joint ventures constitutes one such barrier. Legislation to remove that barrier is in no way intended to change the major thrust of existing antitrust law. It simply would be a creative fine-tuning of these laws to foster an environment conducive to achieving what must be an important national policy goal -- increased innovation through joint research.

Why Stimulate Joint Ventures

Why should we seek to stimulate joint research and development ventures? Clearly because no other sector of our economy is viewed with such high expectation as is research and development--and not without foundation. Research and development has truly been the horn-of-plenty--the cornucopia--that has driven our mighty economic engine since World War II. At this time of increasing international competition it is important that we develop a national commitment to revitalize the nation's economy, to enhance our international competitiveness, and to spur industrial innovation and increased productivity.

The success of the high technology industries depends on their ability to stay ahead of foreign competitors in producing products using state-of-the-art technology. Often, those foreign competitors are free to mass their resources against American firms. Increasingly, people contrast United States R&D policies with Japan where its Ministry for International Trade and Industry actually promotes mergers and cooperative arrangements to revive flagging industries or to develop new products. R&D in Japan is becoming more and more rationalized, or to be more accurate, targeted. Under Public Law 84, the Japanese Government has manifested its role in rationalizing industry, discouraging noncompetitive companies, cartelizing the remainder, organizing joint research ventures, sharing the technology amongst the various participants, using administrative guidance to discourage foreign competition, providing funds for the research, and doing a host of other things to support, nurture and develop Japanese industries. With that array of weapons in their industrial arsenal, the Japanese are truly formidable competitors. We have a completely different culture and historical background. What is the proper role of our government? That dialogue is beginning to take center stage on the American scene. What surely can be said is that at the very least the government should create the environment where the competitive forces of our market driven economy can operate effectively to leverage its strengths and minimize its weaknesses.

There are many other practical justifications for promoting joint ventures. First of all, many companies simply are not able to perform desired levels of R&D because of a lack of financial resources--R&D is very capital intensive. The cost of innovation in computer technology, for example, is growing exponentially. Secondly, many companies lack the necessary human resources--there is a serious shortage of adequately trained scientific and engineering manpower.

Why Legislation

American genius and technical innovation will flourish if given meaningful incentives and freedom from inhibiting restraints. I believe that antitrust law has hamstrung innovation, especially in the field of joint R&D. Our rugged individualism--induced by our frontier background--combined with uncertainty over the application of the antitrust laws, has inhibited the use of joint research as a weapon in the industrial arsenal of the U.S. This is unfortunate because when properly applied joint R&D can be extremely effective.

Clarifying legislation would eliminate current legal uncertainty surrounding joint R&D ventures, stimulating increased R&D from the private sector. Over time, this would accomplish the creation of a framework for longterm basic industrial research activity. As you well know, too much of the industrial research performed focuses only on shorter-term applied research driven by industry's need for immediate return on investment. By pooling resources, companies can afford longer-term research--the fruits of which will be employed to assure our industrial competitiveness worldwide. Certainly, one would also expect as a longterm benefit of this legislation a real increase in the productivity growth rate, a lowering of the inflation and unemployment rates, and a stimulated economy.

Some argue that current antitrust laws are not a deterrent to joint R&D ventures. I suggest that no matter how remote, the risk of suit by private third parties still exists. To those who have said that our antitrust laws are flexible enough already, and that our review procedure in Justice is adequate, let me quote Mayor Alioto in his letter to the heads of companies participating in the MCC: "The reported 'clearance' letter from the Antitrust Division of the Department of Justice is not remarkable. Even a student of the antitrust laws knows ... that a clearance letter from the (present) Antitrust Division is not an authorized grant of immunity from private antitrust enforcement. Neither the Courts, the law nor private parties are the least bit bound by Mr. Baxter's philosophy of what the antitrust laws should say or how they should be interpreted."

Review of Legislation

Various legislative solutions to this antitrust uncertainty have been proffered. No one would question that each proposal embodies an identical conceptual goal--that of course being to stimulate joint R&D ventures by clarifying the application and interpretation of the antitrust laws. Only the specific approach to accomplishing this goal has differed in the various proposals.

I would like very briefly to review the progress of this legislation for the record, and for sake of you present today. In 1981 EIA sought to have introduced in Congress a legislative approach to this issue which we presumed would have the desired effect. Under that proposal which was later introduced in the

House by Congressman Don Edwards and in the Senate by Senators Glenn and Kennedy, firms interested in forming a joint venture would utilize the existing business review procedure in the Department of Justice. If the Attorney General determined that the venture was not likely to violate the antitrust laws, then he would issue a certificate of immunity. The venture would be immune from criminal and civil suits until the Attorney General lifted the immunity. The key ingredient in this legislation is that it provides certainty to the coventurers by removing retroactive damages for actions consistent with the approved R&D plan submitted by the joint venture.

The Department of Justice opposed this legislation on grounds that it placed them in an inappropriate regulatory mode which would fundamentally alter the Department's role as a law enforcement agency. Consequently, Senator Mathias and later, Congressman Synar, introduced legislation which would establish a self-certification process based on a series of specific objective standards. This process would provide interested firms the capability of definitely determining whether or not their proposed venture would be lawful. Having met those guidelines, the venture would be accorded criminal and treble-damage immunity. The benefits of this approach from industry's perspective is that legislated guidelines would answer Justice's opposition to prior review and granting certificates. In addition, legislated guidelines would provide the certainty, as to the venture's lawfulness, which would effectively reduce suits by the private antitrust bar.

Additionally, Senator Tsongas introduced similar legislation which you have also heard about this morning. His bill combines the prior review by the Attorney General with legislated guidelines which are broader than those in the Mathias and Synar bills. Most recently, Congressman Sensenbrenner introduced similar legislation.

At this point, it is important to note that a portion of the recent proposal by the Reagan Administration regarding antitrust reform bears directly on this subject. This package is further evidence of the broad bipartisan support which exists for stimulating joint ventures. The proposal reflects the kind of thinking which I spoke of earlier about how we view our position as a world competitor. One important caution, however, should be made. Inasmuch as the Administration's package addresses far more than R&D, and entails major changes in antitrust laws, I would encourage members of Congress to consider the legislation being addressed today as one small R&D piece which is too important to become captive to the larger debate which logically will follow the Administration's proposals for sweeping antitrust reforms.

The task before us is a difficult one. To cull from the various approaches a legislative solution which will satisfy the goal of stimulating industry joint ventures, satisfy industry's need for certainty, and most important satisfy the challenges before the U.S. to compete internationally will require a great deal of work.

Allow me to propose, on behalf of the EIA membership, what we would like to see evolve as a legislative solution. We would favor legislation that would embody the goals and principles as they have been described, and which would, whether by self-certification or a blessing from a government agency, create what I call a new "zone of certainty" within which private industry can make important decisions about its research activities with immunity from future antitrust attack by either DOJ or private antitrust litigants. Certainly there will be cases in which it is not crystal clear to the firms contemplating a venture their standing vis a vis this new zone. In these limited cases we would propose there be a mechanism to create a "zone of safety"; in which the Department of Justice or some other agency could assist in making a final determination through some approval procedure.

Despite our vast resources and knowledge, there persists a sense of apprehension in the air as we face the challenges of international competition in the final years of this century. This apprehension comes from a fuller realization that we no longer have a corner on the market of brains and technological innovation. It is time to turn our vast resources and knowledge into real advantages--indeed, to leverage them as best we can to ensure our role as the world leader in technology. R&D will continue to drive our engine of progress. We must pursue it as aggressively as ever if we are not to lose our position as a world leader.

Mr. Chairman, my testimony has been purposefully broad and supportive of the basic conceptual approach to stimulating joint ventures. I would be pleased to answer any specific questions regarding provisions of the various bills.

Electronic Industries Association

Peter F. McCloskey
President

1983 AUG -5 AM 9 16

August 3, 1983

The Honorable Strom Thurmond
United States Senate
218 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Thurmond:

This is in response to your letter of July 6th outlining certain questions which Senator Hatch had submitted.

The answers are given in numbered form corresponding to the questions asked.

1. and 3. Clear standards pertaining to legislation would be very helpful in providing the necessary clarity to encourage businessmen to take advantage of the leverage of joint research to advance the state-of-the-art in their respective fields. (3) I would be in favor of establishing standards in which such companies could self-certify, recognizing that the boundary cases would require some further step by an approving body within the government.

2. It does make sense to limit Justice Department review to the questionable cases that fall under the boundaries of the standards. We do not want to offset the advantages we see in efficiency in the nations economy with an increased bureaucratic requirement in terms of manpower, money or delays. I do think it is important that for conduct that falls close to the lines of entermissable conduct, that there be a mechanism to remove the uncertainty.

4. I agree that limiting DoJ's review to particularly questionable cases would reduce the amount of regulation and bureaucracy required. And, given the history of so few such ventures, DoJ is not likely to be overburdened.

5. The benefits to society of joint research and development are so overwhelming that we should not deter such activity with the threat of treble damages. Adequate protection is provided by single damages in cases that are deemed subsequently to have violated the anti-trust laws. I certainly concur with treble damages as they relate to per se violations but think it unwise to apply it to cases where companies have fully disclosed their activities in advance and have attempted to live within those disclosures.

6. I think it simple equity to provide the prevailing side's recovery of attorney's fees in anti-trust cases relating to research and development. As I understand it, the present law provides successful plaintiffs recovery of attorney fees. The cost of defending against nonmeritorous suits is much greater and should be recognized as an off-set to those thinking of finding such suits.

We appreciate the opportunity to answer these questions and to appear before your committee, and are hopeful that you will use your offices to help bring this legislation to fruition. I look forward to being of assistance in this effort.

Sincerely,

Senator **MATHIAS**. Mr. Leary.

Mr. **LEARY**. Mr. Chairman, my name is Tom Leary and I am appearing here for the National Foreign Trade Council. I have submitted a statement for the record and I will just summarize a few points, with specific comments on the three bills currently before you, S. 568, S. 737, and S. 1383.

We have not prepared comments on the Department of Justice's approach because it was not available at the time we submitted our statement and we ask your indulgence, if you will, to receive a written statement with respect to that when it does become available.

On balance, the council prefers the basic approach in S. 568 and S. 737 because they set out relatively objective standards which provide safe harbor protection for those people who want to avail themselves of it.

There may be a great many companies which do not need that kind of protection. There may be a great many companies that have available to them sophisticated antitrust advice so that they can shape a venture on their own and they do not need that procedure.

But the appeal of the safe harbor procedure is that it provides a refuge for people who may not have access to that kind of advice. It brings confidence to business executives who may have a perception that the antitrust laws create a problem. Maybe it is a wrong perception, as Mr. Baxter has indicated, but that perception may chill otherwise desirable activity.

There are a few differences between S. 568 and S. 737 which I would like to address. The bill S. 737, as Mr. Baxter indicated, provides an easier certification procedure because it is automatic. Balancing that is a somewhat less certain immunity because in subsequent private litigation the demonstration that you have complied with the standards of S. 737, however specific they may be, is going to be a little more complex and a little more difficult than a simple demonstration that you have a Department of Justice certificate.

We simply note these differences so that the committee can consider the tradeoffs between more certain immunity and easier enforcement.

Second, we are concerned about an unintended side effect that may occur in both S. 568 and S. 737. We recognize that safe harbor standards are rightly more restrictive than general antitrust principles.

We believe the legislation should make it clear that certification standards are not intended to impact upon standards applied to existing ventures or future ventures that are not submitted for certification. We have suggested some language in our written statement to take care of that unintended spillover effect.

We believe, in addition, that section 5(1) of S. 568, which provides a procedure for grandfathering in existing ventures and getting them certified, is a good idea that might well be incorporated in S. 737, if that approach appeals to you.

Finally, we have pointed out in our written statement that there are considerable variations in the substantive standards for certification set forth in S. 568 and S. 737. In some cases, one bill is more restrictive; in some cases, another bill is more restrictive.

The rationale for these restrictions themselves and for the variations between the bills is not clear, and we urge the committee to focus on these differences and on the restrictions themselves.

In general, we would urge the adoption of a more liberal approach where it can be done consistent with antitrust principles, unless there is a good reason not to adopt a more liberal approach.

We believe that the safe harbor legislation will be meaningful to the extent the procedures are used. Obviously, the more flexibility and practicality in the procedures, the more apt the procedures are to be used.

Thank you.

[The prepared statement follows:]

STATEMENT OF THE NATIONAL FOREIGN TRADE COUNCIL ON BILLS TO PROVIDE ANTITRUST EXEMPTION FOR JOINT RESEARCH VENTURES

My name is Thomas B. Leary and I am now a partner in the Washington firm of Hogan & Hartson. Prior to the first of the year, I was an Assistant General Counsel of General Motors Corporation, with overall responsibility for the Corporation's antitrust matters, and I have specialized in antitrust law throughout my years of practice. I serve as Chairman of the National Foreign Trade Council's Working Group on Antitrust. I appear on behalf of the Council, a private, non-profit business organization of more than 600 U.S. companies engaged in international trade and investment, including most of the country's leading exporters and multinational corporations. Our member companies engage in extensive research and development, both in the United States and abroad.

My testimony is addressed to bills entitled "Joint Research and Development Ventures Act [of 1983]," introduced by Senator Paul E. Tsongas (S.568) and Senator Charles Mathias (S.737) in the Senate.*/ The Council generally supports both bills because we agree there is an urgent need to promote the growth of high technology industries in this country and because the antitrust laws are perceived as inhibiting joint research activities toward that end. We do, however, have certain specific amendments to suggest, which will be discussed below.

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*/ A bill identical to S.737 has been introduced by Representative Mike Synar (H.R.1952) in the House. Various alternatives have also been advanced. The "Antitrust Joint Research Act of 1983," (S.1383) introduced by Senators John Glenn and Edward M. Kennedy, and the "Joint Research Act of 1983 (H.R.108), introduced by Congressman Don Edwards authorize the Attorney General to issue "certificates of review" to R&D ventures, providing immunity against treble-damage and criminal suits. Attorney General William F. Baxter has proposed the elimination of treble-damage-liability for "rule of reason" offenses, and would judge all research joint ventures by the reasonableness standard.

NEED TO IMPROVE INDUSTRIAL COMPETITIVENESS

There is a pressing need to accelerate the growth of high technology industries and to strengthen the international industrial competitiveness of the United States. As the National Research Council recently pointed out, "...a strong capacity for technological innovation... is vital to the future growth of the entire American economy."*/ Recent studies have concluded that the United States still retains a strong competitive advantage in technology-intensive trade, but the evidence also points to an erosion in that position. Since 1963, the ratio of research and development to gross national product has declined in the United States while the ratio has increased in Japan and West Germany. Domestic patenting by U.S. inventors declined 26 percent between 1971 and 1978, while

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*/ "International Competition in Advanced Technology: Decisions for America." National Research Council, Washington, 1983, p.2

U.S. patents granted to foreign inventors increased by 71 percent over the same period.[*/] And since 1960 the proportion of industrially funded R&D devoted to basic research has fallen from 8 percent to 4 percent.[**/]

Other countries provide their advanced technology sectors with a wide range of direct and indirect subsidies for research and development. The United States, historically dedicated to the allocation of resources by market forces, should take all possible steps to encourage private sector research. As the National Research Council put it, "maintaining a world-class research structure is essential" to international competitiveness. And because many important R & D initiatives are beyond the financial or technical capability of individual companies, a strong U.S. competitive posture will require increased cooperation among companies through joint research ventures.

PERCEPTION OF UNCERTAINTY

Opinions differ as to whether the antitrust laws actually prohibit desirable joint research ventures. Under

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[*/] Twenty-sixth Annual Report of the President to Congress on the Trade Agreements Program, pp. 26-31

[**/] "Americas Competitive Challenge," the Business-Higher Education Forum, Washington, 1983, p.19

existing law, most joint research ventures are evaluated under a rule of reason standard. It is clear, however, that there is widespread uncertainty in the business community about what the antitrust laws do and do not allow and this uncertainty may broadly inhibit business organizations from engaging in pro-competitive research joint ventures. For example, the recent report by the National Research Council, referred to earlier, asserts that "there is a general uncertainty regarding what corporate actions may elicit legal actions on the basis of antitrust legislation. Because of this uncertainty, management cites antitrust policy as creating excessive risk for a range of activities that may benefit innovation and trade..." The report of the Business-Higher Education Forum on American competitiveness reaches a similar conclusion. And the 1980 "Report of the President on Export Promotion Functions and Potential Export Disincentives" declared that "uncertainty about the application of the antitrust laws...may cause business to abandon or limit questionable transactions," and specifically referred to joint ventures for research as activities which may be adversely affected.

SUPPORT FOR LEGISLATION

The bills under consideration are designed to promote private sector research by reducing antitrust uncertainty. They provide, through different procedures, for "certification" of proposed research activities and consequent antitrust immunity for certified ventures. These are desirable objectives, even if many or most ventures do not find it necessary to qualify.

The bills will be meaningful, however, only to the extent that their procedures are employed and it is therefore desirable that the certification standards be as flexible as possible. We have some suggestions for enhancing flexibility, without compromising legitimate antitrust concerns. We also suggest changes to ensure that the standards for certification which are enacted do not have an unintended spillover impact on the standards of legality applied to ventures which do not seek certification in the first place.

COMMENTS AND SUGGESTIONS

1. The Tsongas bill (S.568) and the Mathias bill (S.737) differ in their basic approach. The Tsongas bill contemplates that a prospective joint research and development venture would have the option to obtain an affirmative certification by the Justice Department; the Mathias bill provides for automatic certification upon notification by the venture that it complies with certain objective standards. The Tsongas bill provides generally more flexible standards for certification. It also provides greater security because if a joint venture is challenged on antitrust grounds, proof of certification

will be simpler than proof of compliance with statutory criteria (specific though they may be). On the other hand, the burden of information gathering by the government and of reporting by the venture is likely to be greater under the Tsongas bill than under the Mathias bill because the latter does not require the Justice Department to investigate all cases. We would recommend careful consideration of these tradeoffs because good arguments can be made for either approach.

2. There are other variations in the substantive standards in both bills which do not seem justified by the differences in basic approach and the Congress should consider adoption of the more liberal standard, whichever bill might contain it. Existing antitrust law, as elaborated in the Antitrust Guide Concerning Research Joint Ventures, which the Justice Department published in 1980, provides considerable flexibility in the formation of research ventures. While we recognize that "safe harbor" tests would naturally be somewhat more restrictive, there is a real risk that the certification procedures will be largely unused if they are unduly rigid or burdensome.

The most significant variations are the following:

(a) The Tsongas bill taken an unduly restrictive view of agreements to share "previous or future research" (Sec.5(d)(1)(D)(ii)). Such sharing might be of considerable importance to a venture and the greater flexibility provided by the Mathias bill (Sec.4(c)(3)(A)) is therefore preferable.

(b) Paragraph 5(d) of the Tsongas bill will create confusion. It states that the Attorney General can deny certification to a venture that otherwise meets the standards if "he finds that any of the joint research and development programs will lessen existing or potential competition between firms to such an extent as to foreclose the existing or potential competitors from participating in such market." It is unclear whether this is a general savings clause which gives the Attorney General broad discretion or whether it is aimed only at particular ancillary restrictions which might be imposed upon venture participants. If broad discretion is intended, that seems inconsistent with the basic thrust of the statute; if specific practices are the concern, some greater precision would be desirable.

(c) Both bills basically provide that the venture be open to all concerns. The Mathias bill, however, requires that the venture programs be segmented so that participants can pick and choose among them (Sec.4(b)(2)-(3)). This requirement could discourage certification of worthwhile ventures.

(d) There is little justification for the ten-year limitation on projects in the Mathias bill (Sec.4(c)(4)). Moreover, the bill would require disclosure of technology after three years (Sec.4(e)(5)), compared with six years in Tsongas (Sec.5(d)(1)(B)). Either period could be too short a time to recapture investment in research expenditures or to allow for any necessary appraisal of new products by government agencies.

(e) The detailed governance provisions in the Mathias bill (Sec.4(d)(1)-(6); Sec.4(e)(1)-(6)) seems needlessly inflexible and conducive of litigation. We question whether it is necessary to spell out in such great detail the duties of the management board and the procedures for patent applica-

> tions, sharing of royalties and distribution of licenses. In particular, the requirement for three academic or other "public" representatives in management seems unduly inflexible.

3. The Committee may feel that some of the changes which we advocate introduce too much flexibility into legislation which is intended merely to delineate a "safe harbor." If so, an alternative approach may be feasible.

It is commonly accepted that antitrust risk increases as venture activities move away from pure research toward the development of commercial products. The Antitrust Division's 1980 Guide expresses the concept this way:

> The intensity of antitrust concerns about joint research will vary along the antitrust spectrum: less intense about "pure" basic research, undertaken without ancillary restraints on use of the results, to more intense at the developmental end of the research spectrum, particularly if ancillary restraints are involved.
>
> A pure research joint venture without ancillary restraints has never been challenged by the Antitrust Division . . . .

Each bill provides for certification of both "research" ventures and ventures at the "development" end of the spectrum, and imposes the same general restrictions on each. Even though lines are difficult to draw, it might be appropriate to differentiate pure research ventures from other ventures and extend to them more liberal standards for certification.

As might be expected in a broadly based organization, representing all kinds of businesses, the Council's members have differing views on this particular suggestion. Accordingly, we merely suggest it as an alternative for consideration.

4. There is a real risk that the "safe harbor" requirements set forth in the bills will be misinterpreted as a restatement of applicable legal standards. It is unlikely that a government enforcement agency would urge such an interpretation, but private litigants attacking an uncertified venture may urge that noncertification is tantamount to antitrust illegality. The Tsongas bill approaches this problem by providing that "no determination by the Attorney General with respect to issuance, amendment, modification, or revocation of approval . . . shall be admissible" in support of an antitrust claim (Sec.5(j)). This language is inadequate, however, because it does not protect defendants who did not see fit to attempt certification at all and because a judge might be influenced by the standards of certification in determining antitrust liability with respect to existing and future ventures.

Accordingly, we would recommend that the bills be amended to make it clear that the standards for certification are not intended as a restatement of substantive law and that a failure to seek certification in the first place is also not admissible.

These objectives could be accomplished by revising the language of Section 5(j) of the Tsongas bill (or adding a section to the Mathias bill), to read as follows:

> This Act shall not in any respect modify the interpretation of the antitrust laws as applied to joint ventures which are not approved [or qualified]. Neither the failure of a venture to seek approval nor any determination made by the Attorney General with respect to issuance, amendment, modification, or revocation of approval of a joint research and development venture, shall be admissible in evidence in any administrative or judicial proceeding in support of any claim under the antitrust laws, except as provided in subsection (i). [New language underscored.]

CONCLUSION

The National Foreign Trade Council generally supports the "Joint Research and Development Ventures Act [of 1983]," as set forth in alternative approaches introduced by Senators Tsongas (S.568) and Mathias (S.737). We do believe that the certification procedures set forth in these bills would be more useful to business if they were made more flexible and that this could be accomplished without compromising legitimate antitrust objectives. We have also suggested language to make it clear that the "safe harbor" standards for certified ventures are not intended to have a spillover impact on the standards applicable to non-certified ventures.

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July 22, 1983

The Honorable Strom Thurmond
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Re: Joint Venture Legislation

Dear Senator Thurmond:

On behalf of the National Foreign Trade Council, I am pleased to submit this response to the questions which have been submitted by Senator Hatch. The response will refer to the recently published proposals of the Administration, as well as the currently pending bills.

It would be useful to have clear standards set forth which provide a "safe harbor" for those ventures whose members choose to qualify (Question 1). Smaller companies in particular, may be uneasy about antitrust uncertainty and may be willing to sacrifice some flexibility in order to reduce risk. Since safe harbor standards are apt to be somewhat more stringent than those which the antitrust laws would otherwise require, it is important that a statute specifically disclaim any intention to apply these standards to those ventures not submitted for qualification.

A number of witnesses, including Assistant Attorney General Baxter, have raised legitimate questions about certain qualifying standards set forth in the Tsongas and the Mathias bills (S.568 and S.737). We urge the Committee to consider these questions carefully. We do believe it is important, however, to have some objective guidelines. (Question 2) Accordingly, both the Glenn bill (S.1383) and the draft

Administration bill (printed in 44 BNA ATTRR 1272) would be improved if they embodied, at least, a strong direction that the Department of Justice promptly establish safe harbor standards to provide generic guidance and avoid the need for full review of all cases. (Section 12(a) of the Glenn bill authorizes, but does not direct, the Department to issue guides.)

The Justice Department has objected strongly to the across-the-board certification procedure which would be mandated by the Tsongas and Glenn bills (S.568 and S.1383). Both the Mathias bill (S.737) and the Administration draft would permit the Department to be selective about the ventures which it chooses for investigation. The latter approach would result in less regulation and bureaucracy. (Questions 3 and 4) As we pointed out in our principal testimony, however, an across-the-board affirmative certification procedure does provide a greater measure of certainty.

The Council believes that there is considerable merit in a single damage remedy for research activities that are later found to violate the antitrust laws. (Question 5) In fact, strong arguments can be made for "de-trebling" damages in other kinds of antitrust cases, as the Administration has proposed. The Committee should be able to consider these proposals on their merits without being inhibited by the unsupported claim that selective de-trebling would cripple antitrust enforcement. If, however, it is not practical to include de-trebling provisions in a legislative package, other features of these joint venture proposals are worthy of consideration on their own. This response also applies to the suggestion for recovery of attorney's fees by defendants in appropriate cases. (Question 6)

In conclusion, we suggest to the Committee that there obviously is strong bipartisan support for legislation to alleviate antitrust concerns about research joint ventures. Different approaches have been advanced, but there seems to be widespread accord on basic objectives. The best approach might be an amalgamation of various proposals. For example, appropriate and objective safe harbor standards could be clearly set forth in the statute itself or in Justice Department guidelines prepared under a clear statutory direction. These standards could be supplemented by the notification approach of the Administration bill, with a prohibition of private treble-damage actions against ventures that are notified. Ventures which cannot comply with the safe harbor standards, for one reason or another, would still get protection against the most draconian consequences of uncertainty -- but, at the same time, the ventures will be open to scrutiny and subject to remedial actions.

I hope that these comments will be helpful.

With sincere respects,

Thomas B. Leary

Thomas B. Leary

TBL:mda

QUESTIONS OF SENATOR HATCH FOR THE PANEL MEMBERS - TO BE SUBMITTED TO THE RECORD.

1. One problem that besets R&D joint ventures is the lack of clarity in our antitrust laws as to acceptable R&D joint venture conduct. Could you agree that one solution might incorporate, at least in part, standards which clarify the antitrust laws?

2. This Administration and the Congress have been attempting to deregulate the business community rather than to increase regulation. Would it not follow that the preferred solution to permitting R&D joint ventures would be the one that eschews bureaucratic red-tape in favor of new and clear standards, at least to the extent that such standards provide the necessary clarity in our antitrust laws? Doesn't it make sense to limit Justice Department review to those few questionable cases that require such review?

3. No matter how precise the antitrust self-certification standards that may be written for R&D joint ventures there will always be some conduct that falls so close to the line of impermissible conduct that there will arise some uncertainty. For instances like this, which may occur with respect to any of the new standards, should

legislation provide for some mechanism whereby the uncertainty may be removed (such as DOJ clearance procedure)?

4. If DOJ clearance were somehow limited to particularly questionable cases of R&D joint ventures, it is not true that the amount of regulation/bureaucracy would be minimal?

5. Whether Congress adopts the clear-standards approach of Senator Mathias, the certification approach of Senator Glenn or of Senator Tsongas, or the notification approach of the Administration, questions will inevitably arise as to whether the conduct of the R&D joint ventures falls within the limits contemplated by these various approaches. If the venture engaging in R&D activity is found to have transgressed those limits and to have violated the antitrust laws, should the venture have to pay treble damages or single damages?

6. If the plaintiff sues a R&D joint venture for having transgressed the limits contemplated in whatever legislation may be enacted and if the court finds that the defendant acted in compliance with the legislation, should not a reasonable attorney's fee be awarded to the defendant not only as a matter of equal treatment with prevailing plaintiffs but particularly to discourage the bringing of unmeritorious suits against persons engaging in an activity which we as a nation should encourage?

Senator **Mathias**. Thank you, Mr. Leary.

As Mr. McCloskey has said, one of the encouraging factors in dealing with this issue is the kind of interest that it has stirred up. It is interesting to get the Senator from Massachusetts, Mr. Tsongas, and the Senator from Kansas, Mr. Dole, both introducing remedies for this problem, and so it shows that it really is perceived as a serious problem and it strikes a wide range of American interests.

So, I think there is reason to take heart that the Congress may actually do something about it this year. I do think that when we do something, we want to do the right thing and there was one structural criticism that has been aimed at the idea from an interesting source, and that is Elliott Janeway, who has written to the committee and has suggested that at least as far as the solution proposed in S. 737, the joint ventures would be closed corporations and therefore would be deprived of private venture capital. It was an interesting thought that had not occurred to me earlier.

In fact, one of the rationales for going into this effort is the large amount of capital that may be required which would be beyond the ability of individual corporations to accumulate and which is no longer being supplied by the Government in the volume in which it once was.

So, are we, in fact, setting up a mechanism which will not be self-supporting and which will not have access to the kind of capital it will need?

Admiral **Inman**. Mr. Chairman, may I try an answer at that?

Senator **Mathias**. Surely.

Admiral **Inman**. Capital is important, but talent is even more important. What we are facing at this point, and we need to clearly recognize it, is that we as a country have invested insufficiently in producing the graduate scientists and the graduate engineers, beginning in the late 1960's, to take advantage of the opportunities that lie out ahead.

More than that, we have an insufficient number to deal with the competition from abroad, even ignoring the opportunity for great economic growth. Even if we address those education problems and begin producing a very substantial additional number of graduate engineers, graduate computer scientists, graduate physicists, and graduate mathematicians, it is going to be 10 years before they are available to us.

We have a problem we have to deal with now, and the real problem is making sure that we do not waste that talent we are producing by having them recreate the same basic technology across a large number of industries.

We, in fact, have a great deal to admire in the Japanese in their ability to focus the research on areas that offer promise for success, and they have demonstrated it. Here, again, indeed this joint venture approach does not preclude ultimate spinoffs and venture capital investment down the way. That is a later problem.

The problem at the front is drawing together that research talent to make the breakthroughs.

Mr. **Leary**. Senator, may I make a slightly different comment?

Mr. Janeway may have a point, but that is only one aspect of the broader question of whether or not those detailed, meticulous corporate governance provisions set out in your bill, S. 737, are really necessary in order to protect against anticompetitive conduct. He has pointed out one aspect of it.

Senator **Mathias**. In fairness to Mr. Janeway, I should point out that he not only raised this question, but he offered a suggestion, which was that the joint venture should be opened up to private as well as to institutional participants in the capital market. How does that strike you?

Mr. **Leary**. I do not see why that necessarily creates any kind of an anticompetitive potential and why that should not be permissible under a safe harbor approach.

Admiral **Inman**. My only instant concern, Senator Mathias, is that we not get ourselves in a position here where we are in a bidding war, like we are trying to see who can come up with the largest amount of money to pay, a la football teams or baseball teams; that indeed there is a finite amount of talent out there to deal with a lot of these breakthroughs. And we want to create the legal climate that insures that we as a country get the most use out of that and that we make that technology available to as large a number of U.S. companies to compete as early as possible.

I would worry about an approach that would lead us simply to those that can bid the highest salary get the only talent and monopolize it in making these kinds of agreements. That is admittedly a "from the hip" reaction, but I am worried about that as a I start out trying to staff MCC with relatively modest salaries to offer.

Senator **Mathias**. I suppose that this idea ultimately is going to be tested in this committee on the basis of whether or not a majority of the members believe that it is either procompetitive or anticompetitive.

Now, I do not think I have to call the roll of this panel to assume that you will come down on the side of this being a procompetitive proposal. But what is the best argument that you can put forward to persuade those who may have some doubts?

Mr. Norris?

Mr. **Norris**. Well, I think that the argument is a simple one. We were talking about simplicity earlier. You cannot get in the ball game if you do not have the technology, and what we are talking about here is providing that basic technology, which is broadly available and which will make it possible for not only the participating companies but small companies, who can gain access to it on a reasonable basis, to get into the game and compete.

Mr. **McCloskey**. I think the alternative to that, Senator, is to reach economies of scale by merging companies in order to create that capability within one company. And I think on a theoretical basis, at least, it is obviously better to do just the joint research and development and to leave manufacturing and marketing and innovative ways of bringing to market products to the individual companies. So, from a theoretical basis, this is certainly much better than that.

Admiral **Inman**. Senator Mathias, I worry that those who quickly look at this as somehow anticompetitive are looking through a very narrow glass at a world that used to exist in the United States where we regulated business when it was solely a domestic business.

Even as late as 1960, there was no major segment of U.S. industry that had more than 10 percent of its business impacted by international trade. You know well that there are many now that are at least at 25 percent; there are those that are growing to 50 percent.

We face both some potentially very exciting times for the country or, if we mishandle it, some very dangerous times for this country out over the next 15 to 20 years. We are going to have great difficulty in managing complex economic relationships in the international marketplace, and in managing it so that we lead alliances and keep them together, as opposed to finding ourselves in trade wars and crumbling alliances and offering opportunities for the other great military power but noncompetitive economic power—it is a subject of great worry to me.

I think anyone who concludes that this pooling of research is anticompetitive is simply looking backward to the world they wish we still had instead of the realities that we are going to have to deal with in the years out ahead.

Mr. **Leary**. Senator, I think your best argument is that you are not really trying to change or loosen or slacken existing antitrust standards at all. All you are trying to do, in a relatively limited range of cases, is eliminate that uncertainty which may paralyze people from taking procompetitive action.

Senator **Mathias**. The Senator from Delaware.

Senator **Biden**. Thank you very much, Mr. Chairman. Let me pick up where you left off, Mr. Chairman, and ask the question of whether the pooling of research and development capability, as opposed to the merging of companies, which was the alternative suggested by one of you, is a distinction without a difference.

You made the statement that you just would be pooling research and development and not product line; that would be up to the individual companies. But, in fact, the research and development will determine what the product line is, as a practical matter, will it not?

I mean, that is what this is all about. You are not looking for research and development for the sake of scientific journal publications upon which you will make money selling the journal. So, I really would like you to clarify that for me.

I apologize for coming late, so I do not know your name, sir.

Mr. **McCloskey**. My name is Pete McCloskey.

Senator **Biden**. Mr. McCloskey, maybe you can clarify to me how that is, in fact, a distinction with a difference.

Mr. **McCloskey**. Well, I think the major distinction has to do with the perception of the antitrust laws. There are inhibiting factors today that lead companies not to do joint research. As a matter of fact, there is very little in the way of documented joint research that exists today.

Companies today have, however, merged. There are a great deal of companies that have engaged in mergers to gain economies of size.

Between those two alternatives, it is obviously a procompetitive thing to allow pooling for joint research, with some clarity. I agree, however, with the comment that we are not asking for a change in the antitrust laws. There has been no request for a change in the antitrust laws. There is only a request for clarity of the application of the antitrust laws so that people who engage in activities today, which everyone agrees are open, aboveboard, clear and in the open, will not be subject to retroactive reevaluation and say that what they did was, in fact, a violation.

Senator **Biden**. I understand that part. Let me tell you, I start off with the view and have held the view on this committee since I have been on it, and I still hold it as the ranking member, that we should be willing to listen and have an open mind to those who would have us adopt the antitrust laws because the world has changed.

But I do not think, with all due respect, with the 5 minutes of argument that I have heard, that you gentlemen make the case very well for critics of that position. The analogy you made is one that does not get to the core issue that the Senator from Maryland raised and that is that the decision on this committee and in the body as a whole will be based upon whether or not that oft-used phrase, "the little guy," can really get in.

Now, I would like to put the question a different way. If Dow, du Pont and two other major chemical companies get together and pool their research, how is that going to help a hypothetical Schmedlap Chemical Company, with 47 employees? How do they get in the game and have access to any of that research?

Admiral **Inman**. The language of the legislation is going to play a major role in that, or the approach that is taken by the companies themselves.

[Whereupon, Senator Biden assumed the Chair.]

Senator **Biden**. The assumption is that we do not trust the companies themselves; let us make that clear. That is the reason why there are antitrust laws in the first place. People in this body and the public at-large believe that we cannot fully trust the companies to be competitive, otherwise, we would not need the laws.

Mr. **Leary**. Senator——

Senator **Biden**. You can answer, but after Admiral Inman.

The whole reason for the law is because we do not trust them to, in fact, be competitive. So, leaving it entirely to the company, without some standard to be met is not an alternative we could propose to the Senate, in this Senator's mind.

Admiral **Inman**. When you look at MCC as a structure, as a potential model—and let me assert very strongly my view that we do not need legislation to cover MCC; it is legal. But whether there are going to be other industries that will have a Bill Norris who will spur them to get on with it is not at all clear in my mind.

The international competitive position demands that we create the climate that will insure that that occurs.

Senator **Biden**. I agree.

Admiral **Inman**. How do you do it? You do not do it with mergers, but you do it with joint R&D, tied to a push to get that technology out to other companies. The bylaws were very carefully crafted for MCC. They say a shareholder who invests research gets 3 years' lead in going to the marketplace with the product.

But after 3 years, that technology may be licensed to any company. A shareholder that did not invest in that area of research gets no advantage at all over a nonshareholder. So I think the part in the legislation where you make certain that it is procompetitive is that you shorten the timeframe and, in fact, you have in at least the one draft bill; you shorten the timeframe before that technology must be available to other U.S. companies.

I worry a great deal, Senator, about legislation that looks at trying to decide what combination of joint R&D you permit on the basis of some projected future market share.

Senator **Biden**. I agree.

Admiral **Inman**. With all great respect to you and those of your profession, I feel like I am back dealing again with the OMB budget analyst and the systems analyst in the Pentagon and I am going to have to rely on lawyers deciding, for research that will not produce any products for 6 to 10 years, what combination of people providing talent is going to make a difference in this country being competitive.

Senator **Biden**. I tend to agree with you.

I am anxious to hear what you have to say.

Mr. **Leary**. Yes, Senator. I just say the example you pose of two large companies getting together for a research venture and not letting a small company in might or might not be legal under existing antitrust laws. These bills are not going to change that.

What these bills say is if you want to have a safe harbor, if you want to get certified, if you want to get immunity, you have to let the small company in. So these bills are a plus if that is your concern, without any downside.

Mr. **Norris**. I want to add something here because I had quite a bit to do with the principle that this technology is to be broadly available, especially to small companies. I have been around for a while and I have been in small companies; I started two. Just give me technology that is 3 years old and I will do very well.

So this was a very fundamental point, and I thought that it might be very difficult to get other companies to agree to it and that was not the case. MCC, as Admiral Inman says, has this and it is very, very crucial not only to MCC and to the companies, but of course to the United States.

Mr. **McCloskey**. I would like to add one thing to it, Senator.

Senator **Biden**. Sure; please do.

Mr. **McCloskey**. The whole issue of joint research is intended to stimulate net additional research and development in this country; to not only leverage people, but to leverage capital and to establish centers of excellence.

I think you may have read some of the news stories that accompanied the decision to move MCC to Austin, and it was rather interesting to me that what they were all saying was that Austin may well envision the creation of a 128, a Silicon Valley. And what did Stanford and MIT do but create innovative small companies that spun off.

What happens in the nature of the innovative process in the United States is that you have engineers and scientists and research people who are engaged in projects. Companies cannot fund all those projects. At some point in time a company has to make a decision to close this effort and to leave that one go.

Companies such as Bill's and other companies are allowing the people who do that research who do not get funded internally to move outside and to establish a small innovative venture and let them move with that, maybe with the blessing of the company they came from, maybe with just strictly new venture capital.

But that is the process, and it is a vigorous and invigorating process and one that I think we ought to stimulate, and I think this does that.

Senator **Biden**. Well, the reason I pursue the line that I am pursuing is I want to make it clear to you that it is one Senator's view that unless the case can be made that I think you can make along the lines that we have been discussing, I do not think there is a likelihood of success.

Quite frankly, I question whether this legislation is needed in terms of making what you are attempting to do legal. I think it is already legal, and I wonder whether this is more about changing the mind set of American industry than it is about changing the mind set of the legislature relative to antitrust laws. But that is another question; I do not want to bore you with my view on that.

But the point is that I think that this is just the first of many questions we are going to have to address as a country and as a Congress as to how we adjust to what is a fundamentally altered world as it relates to the ability to compete within the world.

We have been so introspective, it seems to me, as an industrial community, looking only at starting with our domestic market. What amazes me is that the vast majority of companies do not even think in terms of competing beyond the markets to which they have been accustomed. And, in many cases, their present markets now are so competitive that they are not likely to be able to prevail.

We have people running all around this country with Japanese cameras, and they are not necessarily Japanese people. They are coming from little countries around the world, opening up entrepreneurial enterprises in Des Moines, Iowa.

You do not see many Americans running around the Des Moines of Southeast Asia or Africa or Latin America opening up little entrepreneurial enterprises. The business mind set in this country is one which I hold as accountable any day as I hold labor accountable for what has not happened in American industry.

So, as I know the admiral knows, and most of you, we are like Pavlov's dogs; we all are guided by those bells up there. Although I do not salivate, I must move to vote within 5 minutes.

Let me conclude by apologizing to Senator Specter. I had not realized he had not asked questions and I should have waited prior to my asking questions until he asked them. Since he is here, there is no need to adjourn the hearing.

Let me tell you that I am anxious for the committee to pursue this whole question and, if necessary, to broaden the questioning about the overall utility of our antitrust laws relative to how we do become more competitive in the international marketplace.

Senator **Specter**. Joe, the questions that I had in mind have already been asked, and I have got to go vote too.

Senator **Biden**. Well, that being the case, I do not think there are any more questions for the panel.

Admiral **Inman**. Taking 1 minute of your remaining 4 minutes, and you are going to have to run faster——

Senator **Biden**. Sure, sure.

Admiral **Inman**. Let me say that I believe it is essential to send some clear signals this legislative term, and that indeed, unfortunately, business, like a lot of others, waits for positive signs. The Congress needs to lead in giving a sign and we have got to be careful not to let a bill get loaded down like a Christmas tree to deal with all kinds of other problems.

It is clear the joint R&D venture will benefit all of the industries, and we need to get on with that and not let it get bogged down with a lot of other problems.

Senator **Biden**. Well, we are anxious to pursue it. I would just conclude by saying, gentlemen, do not get too used to having him. There are about eight folks out there who want to be President, and I know seven who would like him in their cabinet. And I know he will not be able to resist the call; he will tell you he will, but he will not. He is too much of a military man, if they ask him to go. So, you had better get it done real quick, admiral, because I predict to you that you are going to be asked.

Gentlemen, thank you very much. The hearing is temporarily recessed, not adjourned. I guess there is one more witness, so we will recess until Senator Mathias returns. Thank you.

[Whereupon, the committee was adjourned from 11:59 a.m. to 12:13 p.m.]

[Whereupon, Senator Mathias resumed the Chair.]

Senator **Mathias**. The committee will come to order. I apologize for the delay, professor, in calling you.

STATEMENT OF JOSEPH F. BRODLEY, PROFESSOR OF LAW, BOSTON UNIVERSITY, BOSTON, MASS.

Professor **Brodley**. Senator, it is a pleasure to be here to address you on this matter. I have a longer statement which I would ask to have appended to the record.

Senator **Mathias**. Your full statement will be included in the record.

Professor **Brodley**. I will briefly summarize. As in any legislation, the two overriding issues are the need for the legislation and the means adopted to meet that need, and I would speak briefly to both.

With respect to need, there seems little disagreement about the underlying problem, which is simply a decline in the U.S. share of world exports and the fear that the decline may be related to a decrease in relative research effort and a smaller growth rate of scientists and engineers. These are real fears and, of course, it is a real problem, but it is not a new problem. President Nixon, in his special message to Congress in 1972, recognized the same problem and called for a new partnership between government, business and universities to meet it.

That really is not the issue for this hearing. The issue is the antitrust connection. Has antitrust enforcement hurt our trade effort by inhibiting research progress through joint ventures?

In listening to the testimony this morning, a few points struck me, Senator. First, judging from the testimony we have heard the problem seems to be one of perceptions—perceptions of what the antitrust laws are. But these are perceptions are reported by the able representatives of just one industry, and one has to note that this industry did after all succeed in forming a joint venture. Still, perceptions are important, and I will say something about that in a moment.

Second, we have heard that there is an absence of research and development joint ventures. Accepting that as a fact, there is no showing that this is due to antitrust enforcement. I have made a certain study of joint ventures and one of the things that the literature shows is that businessmen do not easily go into joint ventures of any type—and that is not for antitrust reasons, but because of the difficulty of the joint venture managerial form. It requires a shared control. Some business people reported it to be a managerial form of last resort, so there have not been so many other kinds of joint ventures either, except in certain industries like chemicals.

Third, there is a fairly free association between Japan's great research progress and somehow this being caused by R&D joint ventures. Well, I would commend to the Committee and its staff a study by Professors Patrick and Rosovsky of Harvard, Asia's New Giant: How the Japanese Economy Works (Brookings Institution, 1976). The compendium of articles, which Patrick and Rosovsky edited, reached the conclusion that there is no simple explanation of Japan's progress, and it certainly does not appear from their illuminating study that Japanese progress stemmed from a difference in government policy toward R&D joint venture.

Finally, what do we know in terms of hard, empirical knowledge about the effects of R&D concentration? Well, there have been a number of economic studies, and they are continuing. The bottom line of those studies is that there is no established case or consensus that optimal research requires monopoly or high concentration. Optimal research does require some bringing together of resources, but generally speaking that is well within what the antitrust laws would permit. Indeed, optimal progress has been reported, so far as the studies show, for middle-sized firms.

The best general policy, therefore, still seems to be as the Department of Justice presented, which is to preserve some competition in research and to allow some bringing together of inputs.

Now, the antitrust connection has a peculiar ring because antitrust policy is already so highly permissive. We have heard that the Justice Department has never challenged a research joint venture, except on the basis of certain collateral arrangements, but not because of the illegality of the research ventures itself. So the problem seems to be the private antitrust action.

Now, I think we have to bear in mind that antitrust law itself is changing. And antitrust has been changing during this administration substantially—so that is a factor that must not be forgotten. It is becoming more permissive.

Senator MATHIAS. It changed in this committee. We used to have an antitrust subcommittee, which we no longer have.

Professor BRODLEY. That's right, Senator. If you compare the merger guidelines this year with the ones that Donald Turner instituted a number of years ago, there is a radical change in the permissiveness of most kinds of transactions, so that is certainly a powerful factor.

Still, we must be responsive to the serious representations of concern that antitrust inhibits R&D ventures, and the legislation proposed attempts to do that. I have only a minute to speak about each proposal, but let me just say a word.

First, as to the general exemption proposed by you and many other Senators and Congressmen—S. 737 and H.R. 1952—my own reaction is that it goes farther than is necessary; that is, it permits a concentration of research, and even research cartels, when there is no need for going that far.

If there were a need, that is a different question, but there is no showing of such a need. I think, in a word, the problem with the legislation is that it takes very broad risk in terms of allowing the concert of firms in R&D joint ventures without a specific showing of need.

A second possibility, therefore, might be an industry-specific exemption; it is not in any of the bills, but perhaps a procedure could be devised by which a commission or other group could declare that an industry needs a concentration of research resources. That perhaps would be preferable to enacting a general exemption, which would include industries that do not need it at all.

A third proposal is to reduce the plaintiff's advantages in antitrust litigation. I think I would agree with many of the things you said, Senator, on that. These proposals do too little in that they leave the possibility of legal actions. But they also go too far in that they make fundamental changes in the antitrust laws, which I think, is not the subject of this legislation.

The fourth proposal involves comprehensive advanced rulings by the Justice Department, and that is Senator Glenn's and Senator Kennedy's bill—S. 1383. It seems to me that, of the various proposals, this one most accurately responds to the specific need about which we have heard. It does not change the antitrust rules; of course, we have heard that the other bills do not do this either, but S. 1383 makes the smallest change and still provides immunity.

S. 1383 has one important defect, however; it does not require public disclosure of information about the joint venture so that other interested parties can respond.

There is a fifth alternative that you should not neglect altogether, which is the deferral of legislative action at this time and further study. The reason for considering this alternative would be that there has been an insufficient documentation of need.

A research joint venture is not the total solution. Lots of other policies may be necessary for our research welfare—tax policies, and so forth. There are advantages in looking at the research problem as a whole, and either the Senate could do that, this committee, or perhaps it might be the subject for a national commission.

Thank you.

Senator **Mathias**. Well, thank you very much. I suppose one of the questions that ought to be asked about any legislation is whether it is necessary, whether the status quo is sufficiently unsatisfactory to demand some change.

What is your opinion of the Justice Department's current business review procedure to give business executives the certainty that they need in order to make responsible decisions on joint research opportunities?

Professor **Brodley**. Well, I understand the procedure is not much used, and I do not know totally why it is not used. But I would respond to your——

Senator **Mathias**. That is my information, also.

Professor **Brodley**. It is not much used. One reason it might not be much used is because I do not regard the state of the law as very difficult on the issue of research joint ventures. Research joint ventures are widely permissible, unless they involve concentrations of the market which approach very large proportions.

It may be that the law is therefore clear enough that parties do not need to seek review. That really gets back to the question of whether there is important research out there that is being deterred because of the risk of private damage actions. I have not heard the case for that made today, except for the particular problems of an industry which, of course, has managed to form a joint venture.

I mean, there has never been a case brought against a research joint venture which has confined itself to research, and I attempted to review all of the joint venture decisions in writing an article last year. And while no one can ever speak of all decisions and be perfectly comfortable, nothing comes to mind in terms of a private action. There may be some, but nothing comes to mind that would lead me to think that there is a barrier of a legal nature, even though businessmen may fear some things.

Senator **Mathias**. But, again, as you pointed out in your statement, it is to some degree a question of perceptions.

Professor **Brodley**. Surely and perceptions are important, but if that is the need for the legislation, then perhaps the committee should hear perceptions of others, perhaps other industries, and perhaps the legislation should be approached on that basis. What is the least you can do to quiet perceptions?

It seems to me, Senator, that that is quite different than if there were important consolidations which the antitrust laws would prohibit. Then I think you might decide that you wanted to change antitrust standards. But considering how tolerant the antitrust laws are of research joint ventures, it is hard to think that that is the problem.

Senator **Mathias**. Earlier, I asked the Secretary of Commerce about his views as to whether or not joint ventures should be permitted between domestic and foreign corporations, and he somewhat casually shrugged off the question by simply saying it happens all the time.

That does not really address my inquiry as to whether or not it ought to happen. Do you have any views on that?

Professor **Brodley**. Well, I think I am only qualified to answer from the standpoint of the antitrust laws. I do not see any antitrust problem with it so long as it meets the general antitrust standards.

More specifically, if that kind of a joint venture were to combine a dominant part of the industry, leaving out certain U.S. firms, for example, then I would have lots of objections to it.

But let me explain further what would be the proper legal approach. First, one would ask whether the combination is necessary and indispensable for research progress. If not, then it clearly would be unlawful. If it is necessary, then I think the antitrust laws would permit it, but they would require access provisions such as you have put into your bill.

I do not know of any antitrust reason for limiting R&D joint ventures to domestic firms.

Senator MATHIAS. Now, you have already been kind enough to say you agreed with my view that we should not load this bill down too heavily.

Professor BRODLEY. Yes.

Senator MATHIAS. And by that, I assume you are thinking of the so-called detrebling aspect. Would you further agree with me that that is the kind of fundamental step that will arouse a storm of protest?

Professor BRODLEY. Yes, I agree with you fully and I think there is a reason for that storm of protest, which is that this is a fundamental—you said it very clearly—a fundamental change in antitrust standards. And while Congress can make that sort of change, it should not do so in the format of coming in on a limited, targeted bill. Rather it is the subject for a very important hearing which would reexamine the basis of the antitrust remedies, perhaps deciding whether they are adequate for modern times.

That might be a hearing that would be worth undertaking, but it certainly would be very extensive, and it should be extensive. To introduce it here would, I think, unwisely complicate and drag this hearing into directions it ought not to go.

Senator MATHIAS. Well, I feel reinforced by your opinion on that. I do think that it raises serious dangers to doing something which otherwise seems to be widely considered to be a desirable thing to do.

I have no further questions. I do not know whether there is anything you would like to add to what you have said.

Professor BRODLEY. Well, I think not. I have made a fuller statement in my testimony.

Senator MATHIAS. Well, we appreciate very much your being here and appreciate your patience in staying to the end. And let me repeat my regret that we were interrupted by rollcalls, which always has a disturbing effect on these proceedings.

Professor BRODLEY. I understand. Thank you, Senator.

Senator MATHIAS. We also have several questions from Senator Hatch which will be submitted for the record and the witnesses, as appropriate, will be asked to submit answers for the record. And the record will be held open for an appropriate period of time so that that can be done.

The committee will stand in recess, subject to the call of the Chair.

[Whereupon, at 12:31 p.m., the committee was adjourned.]

[Prepared statement follows:]

PREPARED STATEMENT OF JOSEPH F. BRODLEY

PROFESSOR OF LAW, BOSTON UNIVERSITY

Several bills have been introduced that would under specified conditions exempt research joint ventures from the antitrust laws. To provide the Committee with an assessment of that legislation it is necessary to consider three questions: (1) What is the underlying problem to which the legislation is addressed? (2) How is that problem linked to antitrust enforcement? (3) Assuming such a linkage, what are the various policy alternatives and what are their respective costs and benefits?

I. UNDERLYING PROBLEM TO WHICH LEGISLATION IS ADDRESSED

The basic problem which gives rise to the several proposals that would alter the relationship between the antitrust laws and research joint ventures is the growing challenge to U.S. technological leadership. This is reflected in the decline in the U.S. share of world exports of manufactured goods, including technology intensive goods. Arguably, a cause of this decline is the relative decrease in the U.S. share of G.N.P. devoted to research and the diminishing growth rate for R&D scientists and engineers employed in the U.S. as compared with other countries. *See* U.S. Commerce Department, *An Assessment of U.S. Competitiveness in High Technology Industries* (1983).

The various factors mentioned, all of which of course could impact U.S. technological leadership, do not represent new problems, nor have they been unrecognized in the past. Indeed, responding to many of the same concerns, President Nixon in his Special Message to the Congress on Science and Technology in 1972 proposed a partnership between government, universities and private enterprise to encourage research. See Special Message to the Congress on Science and Technology, 1972 Public Papers of President Nixon, 416 (March 16, 1972). But in the intervening ten years we have seen our position erode in world markets where we were previously dominant, as in automobiles, or challenged, as in computers.

The problem for this hearing, however, is not the decline in the U.S. share of world manufacturing exports as such, but whether (1) declining manufacturing exports are due to diminished research effort, and whether, if that is so, (2) overzealous antitrust enforcement has caused such lessening of research effort. In response to the first question, it is by no means clear that the relative decline in U.S. exports stems from diminished research, but I am willing to assume that any decline in the growth rate of research is a cause for legitimate concern given the correlation between R&D inputs and technological innovation. See Schmookler, Invention and Economic Growth (1966). Thus, the ultimate question, as I see it, is whether the antitrust laws as presently enforced have inhibited desirable research effort through joint ventures.

II. ANTITRUST ENFORCEMENT AND R&D INVESTMENT

Enforcement of the antitrust laws assertedly inhibits R&D investment because it limits joint research activities between competitors and potential competitors. Inability to form joint ventures assertedly inhibits research in two ways. First, limitations on joint research prevent the achievement of research economies of scale, which arguably requires a greater concentration of firms than does the achievement of production economies. Second, limitations on joint research prevent firms which innovate in fields that are not fully covered by patents from capturing the full benefit of their innovation. Instead, they must share the benefits with "free riders," who simply copy the successful innovation without having borne any of the research cost. Because this lowers the return to innovation, firms arguably devote fewer resources to research.

There are two problems with this asserted adverse relationship between antitrust and R&D investment. The first is that the correlation between firm size and research is weak. The second is that antitrust enforcement against R&D joint ventures has been modest.

Empirical research provides little support for the existence of large scale economies in R&D beyond relatively low thresholds of firm size and concentration levels. Size up to about $250 to $400 million in sales appears to have a positive effect on research. Findings are mixed as to whether size above this level confers identifiable benefit (with the exception of exceedingly complex projects, such as have occasionally occurred in the chemical industry). Cf. F. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 422 (2d ed. 1980). Similarly, researchers have reached no concensus whether there is a relationship between concentration or market share and research productivity. See generally M. KAMIEN & N. SCHWARTZ, MARKET STRUCTURE AND INNOVATION 91 (1982). Nor do the economic studies establish that the inability to capture the full benefits of research explains the relative lessening of U.S. research expenditures. At most it is a matter of conjecture that the decline in research expenditure is due to a fall off in the private as compared with the social return from innovation. See Scherer, R&D and Declining Productivity Growth, 73 Amer. Econ. Rev. 215 (1983).

To the student of antitrust law assertions that antitrust enforcement has stymied research joint ventures have a peculiar ring since enforcement has been exceedingly modest. A pure research joint venture without ancillary restraints has never been challenged by the Antitrust Division. Even as a matter of theory, the Division would raise no objection to a joint venture involving basic research unless it included the entire industry. Even when a joint venture involves applied research, the government would object only if the joint venture included a group of firms having high market share. See Antitrust Guide Concerning Research Joint Ventures U.S. Dept. of Justice (1980); Brodley, Joint Ventures and Antitrust Policy, 95 Harv. L. Rev. 1521, 1570-73 (1982).

The argument that the antitrust laws inhibit research joint ventures rests much less on the risks of government enforcement than on the hazards of private enforcement. The ease with which an antitrust cause of action can be stated, the heavy expense of antitrust litigation and the risk, even if small, of heavy triple damages or crippling injunctions arguably has a chilling effect on the formation of research joint ventures. The force of the argument is limited, however. First it is based on assertions, rather than empirically validated propositions. Second, even if adverse effects occurred in the past, antitrust law is becoming substantially more permissive, and this is particularly true in the field of joint ventures.

To summarize, the decline in R&D investment is, at most, only weakly linked with joint venture antitrust enforcement. Whether this state of affairs justifies legislative intervention is problematic, and most clearly it justifies no radical antitrust surgery.

III. LEGISLATIVE ALTERNATIVES

The rich menu of legislative proposals and alternatives can be divided into five broad categories. These include (1) a general exemption for research joint ventures, (2) an industry-specific exemption based on identified research need, (3) the lessening of plaintiffs' advantages in antitrust litigation, (4) the reduction of antitrust uncertainty through comprehensive advance rulings by the Justice Department and (5) the deferral of legislative action to allow further study of the problem. Not all of these possibilities are reflected in the pending bills, and several bills advance more than a single objective. But by focusing on these broad policy goals, it is possible to clarify our analysis.

A. General Exemption for Research Joint Ventures

Several bills would establish a broad antitrust exemption for qualifying research joint ventures. These include the Mathias (S. 737), Synar (HR 1952) and Tsongas (S. 568) bills. These bills exempt qualifying research joint ventures from the antitrust laws with no restriction as to the market share of the participants (although particular procedures may be involved for high market share groups). The antitrust exemption applies without regard to whether individual research efforts are deficient or lagging or whether the research is fundamental in nature with no immediate commercial application or applied research with high near term commercial value. Finally, both participants and nonparticipants are guaranteed access to the joint venture and to the discoveries that it produces.

The disadvantage of these proposals is that they would permit concentration of research, including research cartels, even when there is no need for such concentration. In order, therefore, to protect the public and industry members from the possible excesses that such concentration might cause, the proposals establish an elaborate array of procedures that are potentially anticompetitive and also litigation-inviting. Thus, access provisions reduce the incentive for competitive research even when competitive research is fully viable; rigid limitations on the term of the joint venture's existence or the period of exclusive access confine the joint venture when a longer term would be more efficient and would do no competitive harm; and, provisions for nondiscriminatory access and licensing of joint venture research on reasonable or fair terms invite dispute and future litigation.

Although the antitrust exemption is limited to research and the Attorney General is given authority to approve and/or revoke the exemption if the joint activities spill over into other areas, these limitations do not sufficiently protect vital antitrust interests. Success of a research joint venture, indeed of any joint venture, requires a free and ongoing exchange of information between the participants. But information and ideas are a seamless web, and there is no effective means of assuring that potentially anticompetitive information is not exchanged without stultifying the joint venture. That is a risk that may be worth assuming if there is no means to evoke indispensable research except by allowing a large share of an industry to engage in joint research, for in that event the potential benefits may exceed the competitive costs. The problem with the general exemption approach is that it assumes the competitive risk without any determination that the particular research benefits likely to ensue justify taking that risk.

B. Industry-Specific Exemption Based on Identified Research Need

An alternative to the general exemption just discussed would be an industry-specific exemption resting on a determination that socially vital research requires the joining of research effort in a particular industry. Based on such a finding the scope of the exemption could then be tied to the specific research need. The size of the research group, provisions for access, antitrust scrutiny, organization and management of the joint venture all could be tailored to the particular case.

None of the legislative proposals appear to follow this approach, but it should be carefully considered as an alternative to a general exemption. The industry-specific exemption avoids the problems of global misjudgment, such as may result from broad provisions that provide for compulsory licensing after three, six, or some other arbitrary number of years. It has the disadvantage, however, that it requires a public agency to determine that individual research plus joint research within the scope of the antitrust laws are insufficient to meet vital research needs. But if that determination is difficult for a specific industry, how much more difficult must it be to make the global judgment that a general antitrust exemption is required.

C. Lessening of Plaintiffs' Advantages in Antitrust Litigation

Several bills contain provisions that would reduce antitrust damages, or otherwise restrict the advantages accorded plaintiffs in antitrust litigation. These include provisions which would be applicable to research joint ventures: the limitation of antitrust damages to single damages (in the Edwards and Administration proposals); the preclusion of the per se rule (in the Administration proposal); and the several proposals to make attorneys fees payable by the plaintiff under certain circumstances. All of these proposals are undesirable because they undertake basic change in the remedial structure of the antitrust laws without assurance that such change will solve the specific problem to which the bills are addressed. Yet such change could have serious implications for the development of antitrust law generally.

The essential problem to which all of the proposals respond is the possible overdeterrence of desirable research joint ventures. While a reduction in plaintiffs' antitrust advanges reduces the attractiveness of antitrust litigation and thus might appear to be a step in the right direction, it still permits a determined plaintiff to throw a joint venture into protracted litigation on the assertion of a colorable claim. Damages and possibly draconian injunctive relief that could disrupt the joint venture continue to be available. Moreover, a resourceful plaintiff would often be able to allege a spill over of collusion into a non-joint venture area such as to allow the joinder of a treble damage claim. As for the proposal to limit the application of the per se rule, the rule of reason is already the governing standard for research joint ventures, and to amend the statute to state that this is the case would be both redundant and unduly interfering with the judicial role, while at the same time it would not prevent plaintiffs from asserting spill-over collusion and joining of per se claims.

The proposals to reduce plaintiffs' advantages in antitrust litigation thus do not solve the problem to which they are addresed, because plaintiffs could still institute burdensome lawsuits. At the same time such proposals would begin a piecemeal amendment of fundamental antitrust remedies that would set an undesirable precedent. That kind of basic change should come only after searching study of the modern function of the antitrust laws and their remedies.

D. Reduction of Antitrust Uncertainty Through Comprehensive Advance Rulings by Justice Department

The antitrust laws conceivably chill the formation of research joint ventures not because of overly stringent legal doctrine or government enforcement, but from the risk of private and perhaps state-instituted litigation. At least two of the bills (Glenn-Kennedy and Edwards) attempt to meet this problem directly by authorizing the Justice Department to issue rulings that would give immunity not only from suit by the federal government, but also from suits by private litigants and state governments.

This proposal does not change antitrust standards, but attempts simply to protect research joint ventures from unfounded antitrust litigation. If we accept that risks of private (and state) litigation have an asserted chilling effect, this approach is highly preferable to the other proposals. It is by far the simpliest of the approaches and that is always a legislative virtue. In addition, it is transaction-specific. The Justice Department can focus entirely on the specific joint venture at hand. If the joint venture presents antitrust risk, the Department can shape particularized remedies, which may include some or all of the restrictions and controls contained in the more comprehensive bills.

There is one important defect in the proposal, however. It does not require the specific terms and substance of the joint venture agreement to be disclosed to the public prior to approval. This prevents concerned individuals and groups other than the actual participants from making fully informed presentations to the Department. In view of the broad immunity to be given, the Department should be informed not only by the presentations of in the joint venture participants, but also by the analysis and views of concerned nonparticipants, including competitors and potential competitors, suppliers, customers and public interest groups. But the comments of outsiders cannot be fully informed unless based on the actual facts of the proposed joint venture, including the agreement between the participants. An appropriate disclosure requirement could follow the language of the Mathias and Synar Bills, which in their notification procedure require disclosure of the identity of participants, the proposed research program and the agreements entered into between the participants.

E. Deferral of Legislative Action

A final legislative option is to take no action at this time, but instead to undertake further study. The justification for further study is insufficient documentation of legislative need. The showing thus far made rests heavily on the claims of a particular industry which has nevertheless managed to form a research joint venture. This is not to say that the claim that antitrust enforcement has constrained research progress is necessarily without foundation. But thus far the case is more one of assertion than proof. A viable alternative would be to desist from making changes at this time, and instead to undertake a comprehensive study, perhaps conducted by a bipartisan commission. One indication that this could be fruitful is the wide divergence between the various legislative proposals, a condition that suggests that the problem is not yet well defined.

Deferral of legislative action on joint ventures avoid the risk of piecemeal change. The problem of lagging research effort calls for a variety of responses. Surely no one contends that a research joint venture bill is the total solution, for tax policy, trade barriers, patent and trade secret protection, scientific education support and government subsidy may all play a role. There are advantages in looking at the research problem as a whole and devising a comprehensive approach. As one example, differing policies directed at a common goal may have interactive effects such that one policy step may interfere with another and thus optimal progress will be achieved by adopting less than the total set of policy proposals. From this more comprehensive perspective, a research joint venture bill may or may not appear to be a desirable step. Thus, a cautious approach to research joint venture legislation is not without advantages.

APPENDIX

II

98th CONGRESS
1st Session

S. 568

To enhance competition by allowing for joint research and development ventures.

IN THE SENATE OF THE UNITED STATES

February 23, 1983

Mr. Tsongas introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To enhance competition by allowing for joint research and development ventures.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Joint Research and Development Ventures Act".

FINDINGS

Sec. 2. The Congress finds that—

(1) research and development are major factors in the growth and progress of our industry and national economy;

(2) many firms are unable to perform their desired level of research and development due to the capital

intensive nature of such research and development programs;

(3) the expense of carrying on certain research and development programs is prohibitive for many businesses;

(4) a firm's or an industry's ability to commit capital to research and development programs is sometimes dependent upon such firm or industry being able to share the risks which such projects often entail;

(5) to the extent that new information or products are brought forward as a result of such sharing, there are genuine procompetitive benefits; and

(6) the uncertainty of interpretation and enforcement of present antitrust laws discourages cooperative research and development, often where such cooperative activity would foster innovation and enhance competition.

PURPOSES

SEC. 3. The purposes of this Act are to—

(1) encourage business concerns to undertake and obtain the benefits of research and development in order to strengthen the national economy and the United States international industrial competitive position;

(2) encourage greater use of joint research and development ventures by the private sector as a means of augmenting the total amount of research and development performed as well as increasing the diversity of research;

(3) provide immunity under the antitrust laws of the United States or any State to an applicant from any prosecution from the moment the Attorney General approves a joint research and development venture until the completion of programs of such venture, or the Attorney General considers it injurious to the competitive balance for such venture to continue and terminates such venture; and

(4) enhance competition by enabling participants in joint research and development ventures, and nonparticipants, on reasonable terms, to have access to and use base technologies resulting from such joint venture.

DEFINITIONS

SEC. 4. For the purposes of this Act—

(1) the term "applicant" means an individual who is a citizen of the United States or an association, partnership, corporation, or other legal entity organized under the laws of the United States or any State or

territory of the United States seeking approval of a joint program for research and development;

(2) the term "research and development program" means a program which is—

(A) a systematic, intensive study directed toward greater knowledge or understanding of the subject studied;

(B) a systematic study directed specifically toward applying new knowledge to meet a recognized need; or

(C) a systematic application of knowledge toward the production of useful materials, devices, and systems or methods, including design, development, and improvement of prototypes and new processes to meet specific requirements;

(3) the term "joint research and development venture" means an association, corporation, partnership, or other multifirm entity organized under the laws of the United States or any State or territory of the United States established to carry out cooperative research and development programs;

(4) the term "State" shall have the meaning given it in section 4G of the Clayton Act (15 U.S.C. 15g);

(5) the term "Attorney General" means the Attorney General of the United States or his designee; and

(6) the term "United States firm" means an individual who is a citizen of the United States or an association, partnership, corporation, or other legal entity organized under the laws of the United States or any State or territory of the United States.

ATTORNEY GENERAL REVIEW

SEC. 5. (a) Except as provided in subsection (l) prior to the initiation of any joint research and development venture, the applicants must request and obtain the approval of the Attorney General in order to gain an antitrust exemption pursuant to section 6.

(b) The request required by this section shall be in such form and contain such information and documentary materials as the Attorney General shall by general regulations prescribe pursuant to section 553 of title 5, United States Code.

(c)(1) The Attorney General shall notify the applicants of his decision within sixty days after the filing of such request.

(2) Such decision shall be accompanied by the Attorney General's findings.

(d) The Attorney General shall approve any joint research and development venture—

(1) if he finds that—

(A) participation in all programs in the joint research and development venture is open to all United States firms and domestic subsidiaries of foreign firms to the extent provided in subsection (k);

(B) the results of all joint research and development programs will be made available within six years after the participants in such venture receive title pursuant to section 7(a)(4) to all firms on reasonable and nondiscriminatory terms whether such firms are members of such venture or not;

(C) any restraints associated with the joint research and development venture—

(i) are necessary to the lawful main purpose of the agreement to form the joint research and development venture;

(ii) have a scope and duration no greater than is necessary to achieve that purpose; and

(iii) are not part of an overall pattern of restrictive agreements that have unwarranted anticompetitive effects; and

(D) no participant in any joint research and development venture is subject to—

(i) any restriction on its own individual research and development activities; or

(ii) any obligations to provide the venture results from its previous or future research and development; and

(2) unless he finds that any of the joint research and development programs will lessen existing or potential competition between firms to such an extent as to foreclose the existing or potential competitors from participating in such market.

(e) Any approved joint research and development venture obtained by fraud is void ab initio.

(f) If the Attorney General denies an application for the approval of a joint research and development venture and thereafter receives from the applicant(s) a request for the return of all documents submitted by the applicant or applicants in connection with the issuance of such approval, the Attorney General shall return to the applicant, not later than thirty days after receiving the request, the documents and all copies of the documents available to the Attorney General, except to the extent that the information contained in a document has been made available to the public.

(g) The Attorney General may at any time commence withdrawal of approval of all or any part of the joint research and development venture by giving to such venture a written copy of findings and a preliminary notice of the withdrawal or modification of such previous approval. Such notice shall—

(1) include a statement of the circumstances underlying, and reasons in support of, the determination; and

(2) state with specificity any actions required in order for the venture or program to come into compliance.

(h) If the program or venture fails to take the actions specified by the Attorney General within thirty days after notice by the Attorney General is given, the Attorney General shall immediately issue to such venture final notice of the withdrawal or modification of such previous approval.

(i) Such withdrawal, modification, or denial of an application for approval of a joint research and development venture or amendment thereof is reviewable by the Court of Appeals for the District of Columbia to determine if the Attorney General's findings were clearly erroneous.

(j) Except as provided in subsection (i) no determination made by the Attorney General with respect to issuance, amendment, modification, or revocation of approval of a joint research and development venture shall be admissible in evidence in any administrative or judicial proceeding in support of any claim under the antitrust laws.

(k) The Attorney General may approve a joint research and development venture which fulfills the requirements of subsection (d) even if it does not provide access to participation to domestic subsidiaries of firms of another nation if it is found that such nation does not provide access to participation in joint research and development efforts to United States firms operating in such nation equivalent to the access provided domestic firms of that nation.

(l) For any joint research and development venture established prior to the date of enactment of this Act the Attorney General shall approve any such venture retroactive to the date such venture satisfied the requirements of subsection (d).

IMMUNITY

SEC. 6. (a) No act or failure to act pursuant to and within the scope of any Attorney General approved joint research and development venture shall be construed to be within the prohibitions of sections 1 and 2 of the Sherman Act, sections 7 and 16 of the Clayton Act, the Federal Trade Commission Act, or any State law in pari materia.

(b) None of the participants in a joint research and development venture, nor the venture, shall be liable under section 16 of the Clayton Act with respect to threatened loss or damage by a violation of the antitrust laws if the threatened loss or damage arises from conduct undertaken in connection with the operation of an approved joint research and development venture.

(c) If, with respect to any claim brought by a person under the antitrust laws against the joint research and development venture, its employees, or the participants, or employees of such participants, the court finds that the violation alleged arises from conduct undertaken in connection with the operation of an approved venture, and—

(1) the venture was formed and operated in conformance with the characteristics set forth in section 5 of this Act, or

(2) the conduct alleged to violate the antitrust laws does not violate the antitrust laws,

then the court shall award to the person or persons against whom the claim is brought the cost of suit attributable to defending against the claim, including reasonable attorney fees.

(d) Upon notice of withdrawal of the approval of the Attorney General, the provisions of this section shall not apply to any subsequent act or failure to act pursuant to such program.

TECHNOLOGY TRANSFER

SEC. 7. (a) Pursuant to subsections (g) and (h) of section 5, the Attorney General shall withdraw approval of all or part of the joint research and development venture if any of the following terms are not satisfied:

(1) all inventions and knowledge developed in the course of a research and development program are promptly reported by the venture to the participant firms;

(2) applications for patents on patentable inventions and methodology are made by the venture on behalf of program participants and the venture retains the title to all inventions, patents and methodologies;

(3) any firm that is a participant in a program at the time of an invention, or the time a methodology is developed is at such time entitled to access to all such resulting patents, inventions and methodologies; and

(4) no later than six years after the venture receives title to any invention, patent or methodology, it shall make access available to any other United States firms, such invention, patent or methodology on reasonable, fair and nondiscriminatory terms in light of the risks assumed and resources expended by the participants.

REPORTING REQUIREMENT; AMENDMENT OF APPROVED VENTURE

SEC. 8. (a) An approved joint research and development venture—

(1) shall promptly report to the Attorney General any change or update relevant to the matters specified under section 5(d), and shall annually submit to the Attorney General a report in such form and at such time as the Attorney General requires; and

(2) shall, in order to maintain immunity under section 6, submit to the Attorney General an application to amend the terms or scope of the previously approved venture to reflect the fact and effect of the change on the conduct specified in the previously approved venture.

(b) For purposes of section 5, an application for an amendment to an approved venture shall be deemed to be a request for approval of a venture, except that the Attorney General shall give written notification of his decision to the applicants within thirty days after the filing of such request. Such applicants decision shall be accompanied by the Attorney General's written findings.

DISCLOSURE OF INFORMATION

SEC. 9. (a) Information submitted by any person in connection with the issuance, amendment, modification, or revocation of the Attorney General approval shall be exempt from disclosure under section 552 of title 5, United States Code.

(b)(1) Except as provided in paragraph (2), no officer or employee of the United States shall disclose commercial or financial information submitted in connection with the issuance, amendment, modification or revocation of Attorney General approval if the information is privileged or confidential and if disclosure of the information would cause harm to the person who submitted such information.

(2) Paragraph (1) shall not apply with respect to information disclosed—

(A) upon a request made by the Congress or any committee of the Congress,

(B) in a judicial or administrative proceeding,

(C) with the consent of the person who submitted the information,

(D) in the course of making a determination with respect to the issuance, amendment, modification, or revocation of Attorney General approval, if the Attorney General deems disclosure of the information to be necessary in connection with making the determination,

(E) in accordance with any requirement imposed by a statute of the United States, or

(F) in accordance with any rule issued under section 10 permitting the disclosure of the information to an agency of the United States or of a State on the condition that the agency will disclose the information only under the circumstances specified in subparagraphs (A) through (E).

ISSUANCE OF GENERAL REGULATIONS

SEC. 10. Not later than 90 days after the date of enactment of this Act, the Attorney General shall issue rules to carry out this Act.

EFFECTIVE DATE

SEC. 11. This Act shall take effect on the date of enactment and shall also apply to any joint research and development venture established prior to such date.

II

98TH CONGRESS
1ST SESSION

S. 737

To allow businesses to jointly perform research and development.

IN THE SENATE OF THE UNITED STATES

MARCH 9 (legislative day, MARCH 7), 1983

Mr. MATHIAS (for himself, Mr. HART, Mr. SPECTER, Mr. BAUCUS, and Mr. CHAFEE) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To allow businesses to jointly perform research and development.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SECTION 1. This Act may be cited as the "Joint Research and Development Ventures Act of 1983".

FINDINGS AND PURPOSE

SEC. 2. (a) The Congress finds that—

(1) research and development are major factors in the growth and productivity improvement of United States industry and of the national economy;

(2) many firms are unable to undertake the levels of research and development necessary for the United States to remain competitive in global markets because of the capital intensive nature of research and development programs and the chronic shortage of trained scientific and engineering personnel;

(3) the expense and personnel requirements of carrying on a sufficiently broad spectrum of research and development programs is prohibitive for many businesses;

(4) a firm's or an industry's ability to commit capital to research and development ventures of potential national importance is often dependent upon such firms or industries being able to share the risks which such projects often entail;

(5) such risks to United States firms have been greatly magnified by reason of activities by foreign governments in selectively subsidizing, sponsoring cooperation of industry members, or otherwise coordinating industrial research and development programs to enhance the positions of foreign firms in the United States and global markets;

(6) the role of research and development, as well as the prohibitive expenses, resource shortages, and in-

creasing risks in its performance, prevail across the entire spectrum of United States industries;

(7) there are genuine procompetitive benefits of cooperative research and development programs in that new knowledge, information, base technologies and products are brought forward; and

(8) the uncertainty of interpretation and enforcement of present antitrust law discourages cooperative research and development, often where cooperative activity would foster innovation and enhance competition.

(b) The purposes of this Act are to—

(1) encourage business concerns to undertake and obtain the benefits of research and development in order to strengthen the national economy and the international competitive position of the United States and to provide the technology to support superior weapons systems for the national defense;

(2) increase the productivity of United States industry by enhancing the availability and use of efficient advanced new technologies;

(3) encourage greater use of joint research and development ventures by the private sector as a means of augmenting the total amount of research and development performed as well as increasing the diversity of research;

(4) provide immunity under the antitrust laws of the United States or any State to any qualified joint research and development venture, and to any participant in such venture; and

(5) enhance competition by enabling participants, and nonparticipants on reasonable terms, to have access to and use base technologies that would not come into being except by joint effort.

DEFINITIONS

SEC. 3. For purposes of this Act:

(1) The term "antitrust laws" shall have the meaning given it in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12(a)), except that the term shall include section 5 of the Federal Trade Commission Act (15 U.S.C. 45) to the extent that section 5 applies to unfair methods of competition.

(2) The term "research and development program" means a program for—

(A) theoretical analysis, exploration, or experimentation; or

(B) the extension of investigative findings and theories of a scientific or technical nature into practical application for experimental and pilot demonstration purposes, up to the stage of industrial application, including the production, testing and licensing of models, devices, equipment, materials, and processes.

The conduct of such a program may include joint action such as the establishment of facilities for the conduct of research, the application of noncoercive standards incident to research, the collecting and exchange of information pertinent to research, the conduct of research on a protected and proprietary basis, the prosecution of applications for patents, the granting of patent and know-how licenses, and the establishment of corporations or other entities to exploit patents and know-how.

(3) The term "qualified joint research and development venture" means an association, corporation, or other multifirm enterprise established to carry out cooperative research and development programs which meet the criteria established in sections 4 and 5 of this Act.

(4) The term "State" shall have the meaning given it in section 4G of the Clayton Act (15 U.S.C. 15g).

(5) A United States firm is a company or other entity controlled by United States firms or citizens, but shall also include entities controlled by a foreign firm or citizens if that nation provides access to participa-

tion in joint research and development efforts to United States firms and citizens operating in that nation equivalent to such access provided domestic firms in such nation.

(6) The term "product" includes any goods or services that are considered by purchasers to be similar by reason of their characteristics, price, or use.

QUALIFIED VENTURES

SEC. 4. (a) To be qualified, a joint research and development venture must include the characteristics specified in this section.

(b)(1) Any United States firm desiring to participate in the venture, or any of its research and development programs, shall be permitted to participate upon the same terms applicable to other firms participating to the same degree.

(2) The research and development programs to be undertaken by a venture shall, to the extent practical, be individually identified and defined, and the contributions required for a firm's participation in but one program separately identified.

(3) A firm desiring to participate in fewer than all of the research and development programs undertaken by a venture shall be entitled to do so, but may be required to pay a proportional share of the venture's common expenses.

(4)(A) If a United States firm participating in a venture accounts for 25 per centum of total worldwide industry sales of a product during any of the preceding three years (as determined by the Attorney General of the United States—hereinafter referred to as the "Attorney General") and its participation in a research and development program to be undertaken by that venture would cause the combined share of all program participants' sales of the product to exceed 50 per centum of total worldwide industry sales of such product during any of such years (as determined by the Attorney General), the firm's participation in that program shall be conditioned upon an affirmative finding by the Attorney General that—

(i) the results of such a program are not likely to be directly applicable to the future production of such a product; or

(ii) such participation is critical to the success of the program and is in the national interest.

(B) In exercising this authority, the Attorney General may issue guidelines describing—

(i) procedures to employ in requesting such a finding;

(ii) information to be submitted in support of such a request; and

(iii) circumstances under which it may issue such findings.

(C) Information submitted by any firm in connection with the submission of such a request or the issuance of such a finding shall be exempt from disclosure under section 552 of title 5, United States Code.

(c)(1) The venture's sole activity shall be the operation of one or more research and development programs, including but not limited to research and development programs participated in by universities.

(2) Except as provided in paragraph (3), a participant in a venture, or any program undertaken by it, shall not be subject to—

(A) any restrictions on its own individual research and development activities;

(B) any obligations to provide to the venture results from its previous or future research and development; or

(C) any restrictions on its exploitation of the inventions resulting from the venture's research and development.

(3) Participant may agree to—

(A) provide, for a reasonable compensation, access to such previous or future individual research and development as is necessary for the venture to undertake its activities;

(B) abstain for a reasonable period of time from the individual disclosure of the results of the venture's research and development;

(C) assign employees to the venture to engage in research and development or technology transfer activities; or

(D) undertake on behalf of the venture a particular aspect of the venture's research and development.

(4) No research and development program shall be undertaken which projects a completion date in excess of ten years from its inception.

(d)(1) The venture may take any legal form, but the documentation establishing it shall include provisions meeting the requirements of this section of the Act.

(2) Ultimate authority for the management of the venture shall be vested in a management board, which shall consist of—

(A) one representative of each participant in the venture; and

(B) at least three United States citizen representatives of nonparticipants, which representatives may be from the United States academic community, nonprofit organizations, public agencies, or other firms.

(3) The management board shall include among its activities—

(A) selection of the chief executive of the venture;

(B) establishment of criteria for the selection of research and development programs, and the selection of such programs;

(C) allocation of any common costs among research and development programs;

(D) subject to the provisions of subsection (b) of this section, establishment of criteria for the admission of additional venture participants as well as the withdrawal of existing participants; and

(E) subject to the provisions of subsection (d) of this section, establishment of criteria for the licensing of venture technology, and the approval of any such licenses.

(4) In choosing to initiate or terminate research and development programs, the management board may take into account—

(A) the importance of the program to the United States economy or defense;

(B) the longrun needs of the United States industries represented by the venture's participants;

(C) the specific needs of participant firms, including the risks and costs for individual firms to undertake the program; and

(D) the educational and intellectual value of the program.

(5) In establishing criteria for the admission or withdrawal of participants, the management board may—

(A) require firms to participate in at least one of the venture's research and development programs;

(B) require commitments to participate in a program for a reasonable minimum period of time, not to exceed three years;

(C) impose reasonable catchup charges for firms desiring to participate in a preexisting program; and

(D) discipline firms that fail to perform their obligations to the venture, by providing for one or more of the following: their expulsion from the venture, the forfeiture of any payments to the venture, and the denial of any right or interest in the assets, including technology, of the venture.

(6) In establishing criteria for the licensing of venture technology, the management board shall, in implementing section 4(e)(5) of this Act, seek to encourage the widest possible dissemination of the venture's technology, but shall give

due regard to the risks assumed and resources expended by participants in the program that created the technology.

(e)(1) All inventions and useful know-how developed in the course of a research and development program must be promptly reported to the participant firms.

(2) Applications for patents on patentable inventions shall be made by the venture on behalf of program participants and venture shall retain title to all inventions, patents, and know-how.

(3) Any firm that is a participant in a program at the time an invention or know-how is discovered or developed shall at such time be entitled to irrevocable, nonexclusive, and equivalent licenses to all patents and know-how.

(4) Participants in a program may be rewarded in a manner which bears an equitable relationship to the risks each assumed, including—

(A) exclusive access to the technology for up to three years;

(B) royalty-free licenses or licenses at royalty rates which reflect the risks assumed and resources expended; and

(C) a share of any royalties collected from nonparticipants in the program.

(5) No later than three years after the participants in a program receive such licenses, licenses shall be made availa-

ble by the venture to any other United States firm on such terms as the participants in the program may establish, provided that such terms shall be reviewed by the nonparticipant members of the management board of the venture, and a majority thereof shall affirm that the terms are reasonable, fair and nondiscriminatory in light of the risks assumed and resources expended by the participants.

(6) In order to encourage the availability to and use by small businesses of developed technology, licenses to program participants or other United States firms, as provided for in paragraphs (3) and (5) of this subsection, shall be conclusively presumed to be equivalent or nondiscriminatory if their provisions with respect to royalties are, to the extent reasonably possible, volume or usage based.

(7) The venture shall collect any royalties on behalf of the participants in a program, and may retain such proportion of the revenues as may be agreed to by the participants.

NOTIFICATION

SEC. 5. (a) To be qualified, a joint research and development venture shall cause the Attorney General to be notified of the formation of such venture. The notification shall be in a form prescribed by the Attorney General, shall be available to any United States citizen on request pursuant to section 552 of title 5, United States Code, and shall include—

(1) an identification of the parties to the venture;

(2) a description of each research and development program to be undertaken by the venture, including its projected duration;

(3) an identification of the participants in each such program;

(4) any agreements pertaining to or describing the venture of any of its programs; and

(5) a statement of compliance with the criteria set forth in section 4 of this Act, executed by an officer of the venture and each program participant.

(b) A qualified venture shall annually cause to be submitted to the Attorney General a report, in such form and at such time as they may require, that updates where necessary the information required by section 5(a).

IMMUNITY FOR QUALIFIED VENTURES

SEC. 6. The following shall apply with respect to any qualified joint research and development venture, and any research and development program which it undertakes:

(1) Neither the venture nor its employees, nor any of its participants nor their employees, shall be subject to a civil or criminal action for a violation of the antitrust laws or a violation of any State law similar to the antitrust laws if the venture satisfies the characteristics set forth in section 4, and a notice is filed pursuant to section 5, of this Act.

(2) If, with respect to any claim brought by a person under the antitrust laws against the venture, its employees, the participants, or their employees, the court finds that the violation alleged arises from conduct undertaken in connection with the operation of a joint research and development venture, and—

(A) the venture was formed and operated in conformance with the characteristics set forth in section 4 of this Act, or

(B) the conduct alleged to violate the antitrust laws does not violate the antitrust laws,

the court shall award to the person or persons against whom the claim is brought the cost of suit attributable to defending against the claim, including a reasonable attorney's fee.

(3) None of the participants in a joint research and development venture, nor the venture shall be liable under section 16 of the Clayton Act with respect to threatened loss or damage by a violation of the antitrust laws if the threatened loss or damage arises from conduct undertaken in connection with the operation of a qualified joint research and development venture.

INVESTIGATION AND DISSOLUTION OF VENTURES

SEC. 7. (a) Notwithstanding section 6 of this Act, a venture may be investigated at any time by the Attorney General for the purpose of—

(1) determining that the parties to the venture submitted correct information in the notification filed under section 5 of this Act; or

(2) determining that such venture, as well as the research and development programs it has undertaken, satisfy and continue to satisfy the requirements of section 4 of this Act.

(b) In the event the Attorney General undertakes an investigation, all parties to the venture or research and development program that is the subject of the investigation shall be given notice thereof in writing. The Attorney General shall conduct his investigation in conformance with procedures to be established by him pursuant to section 553 of title 5, United States Code. If the Attorney General determines after the conclusion of such investigation that a venture or program does not comply with the requirements of this Act, he shall give written notice of such determination, which notice shall—

(1) include a statement of the circumstances underlying, and the reasons in support of, the determination; and

(2) state with specificity any actions required in order for the venture or program to come into compliance.

(c) If the venture or program fails to take the actions specified by the Attorney General within sixty days, he shall commence an action in the United States District Court for the District of Columbia to dissolve the offending venture or programs.

(d) In the event the district court finds that the venture or program is in violation of the requirements of section 4 or 5 of this Act, such court shall order the dissolution of such venture or program.

(e) Any party aggrieved by the determination of the district court may, within thirty days of such determination, seek review by the court of appeals on the grounds that such determination is erroneous.

(f) Information generated in the course of any investigation or court action, or submitted by any person in connection therewith, shall be exempt from disclosure under section 552 of title 5, United States Code.

(g) Neither a determination by the Attorney General pursuant to subsections (a) and (b), or by the district court or court of appeals pursuant to subsections (d) and (e), nor any statements, opinions, or recommendations issued in connection therewith, shall be admissible in evidence in any administrative or judicial proceedings in support of any claim under the antitrust laws.

EFFECTIVE DATE

SEC. 8. This Act shall take effect on the date of the enactment of this Act and shall apply to any joint research and development venture in existence on or after the date of its enactment that satisfies its provisions.

II

98TH CONGRESS
1ST SESSION

S. 1383

To authorize the Attorney General to issue certificates of review applicable under the antitrust laws with respect to joint research and development programs.

IN THE SENATE OF THE UNITED STATES

MAY 25, 1983

Mr. GLENN (for himself and Mr. KENNEDY) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To authorize the Attorney General to issue certificates of review applicable under the antitrust laws with respect to joint research and development programs.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SECTION 1. This Act may be cited as the "Joint Research Act of 1983".

PURPOSE

SEC. 2. It is the purpose of this Act to encourage business concerns to jointly undertake research and development programs.

JOINT RESEARCH AND DEVELOPMENT PROMOTION DUTIES OF ATTORNEY GENERAL

SEC. 3. To promote and encourage joint research and development programs the Attorney General may issue certificates of review.

APPLICATION FOR ISSUANCE OF CERTIFICATE OF REVIEW

SEC. 4. To request the issuance of a certificate of review, two or more persons shall submit jointly to the Attorney General a written application which—

(1) specifies conduct limited to a research and development program, and

(2) is in a form and contains any information required by rule issued under section 13.

ISSUANCE OF CERTIFICATE

SEC. 5. (a) The Attorney General shall issue a certificate of review to an applicant for the certificate if the application for the certificate satisfies the requirements of section 4, unless the Attorney General determines under subsection (b) that the conduct specified in the application is likely to violate the antitrust laws.

(b)(1) Not later than sixty days after the Attorney General receives an application under section 4, the Attorney General shall determine whether the conduct specified in the application is likely to violate the antitrust laws, except that if before the expiration of the sixty-day period the Attorney

General requests that the applicant submit additional information, the Attorney General shall make the determination not later than the expiration of the sixty-day period, or of the thirty-day period beginning on the date the additional information is submitted, whichever period ends later.

(2) If the Attorney General determines that the conduct specified in the application is not likely to violate the antitrust laws, the Attorney General shall immediately issue a certificate of review to the applicant. If the Attorney General determines that the conduct specified in the application is likely to violate the antitrust laws, the Attorney General shall promptly transmit to the applicant a statement of the determination and the reasons in support of the determination.

(c) If the Attorney General denies an application for the issuance of a certificate of review and thereafter receives from the applicant a request for the return of all documents submitted by the applicant in connection with the issuance of the certificate, the Attorney General shall return to the applicant, not later than thirty days after receiving the request, the documents and all copies of the documents available to the Attorney General, except to the extent that the information contained in a document has been made available to the public.

(d) The Attorney General shall specify in each certificate of review issued under this section—

(1) the conduct, including activities and methods of operation, to which the certificate applies,

(2) the business entities participating in the conduct, and

(3) any terms and conditions applicable to the conduct.

(e) A certificate of review obtained by fraud is void ab initio.

REPORTING REQUIREMENT; AMENDMENT OF CERTIFICATE

SEC. 6. (a) Any of the persons who receive a certificate of review—

(1) shall promptly report to the Attorney General any change relevant to the matters specified under section 5(d) in the certificate, and

(2) may submit to the Attorney General an application to amend the certificate to reflect the fact or effect of the change on the conduct specified in the certificate.

(b) For purposes of section 4 and section 5, an application for an amendment to a certificate of review shall be deemed to be an application for the issuance of a certificate of review, except that the effective date of the amendment shall be the date on which the application for the amendment is submitted to the Attorney General.

MODIFICATION OR REVOCATION OF CERTIFICATE

SEC. 7. (a) If at any time the Attorney General determines that the conduct engaged in under a certificate of review violates or is likely to violate the antitrust laws, the Attorney General shall give written notice of the determination to the persons to whom the certificate was issued. The notice shall include a statement of the reasons in support of the determination. In the thirty-day period beginning thirty days after the notice is given, the Attorney General shall modify or revoke the certificate, as may be appropriate.

(b) The persons to whom the affected certificate was issued may bring an action in any appropriate district court of the United States to set aside the determination made under subsection (a) on the ground that the determination is erroneous.

JUDICIAL REVIEW; ADMISSIBILITY

SEC. 8. (a) Except as provided in section 7(b), no determination made by the Attorney General with respect to the issuance, amendment, or revocation of a certificate of review shall be subject to judicial review.

(b) No determination made by the Attorney General with respect to the issuance, amendment, or revocation of a certificate of review shall be admissible in evidence in any administrative or judicial proceeding in support of any claim under the antitrust laws.

PROTECTION CONFERRED BY CERTIFICATE OF REVIEW

SEC. 9. (a) None of the persons to whom a certificate of review is issued shall be subject to a criminal action for a violation of the antitrust laws or a violation of any State law similar to the antitrust laws if the violation arises from conduct specified in the certificate and if the certificate is in effect at the time the conduct occurs.

(b)(1) None of the persons to whom a certificate of review is issued shall be subject to a civil action for a violation of the antitrust laws or of any State law similar to the antitrust laws if the violation arises from conduct specified in the certificate and if the certificate is in effect at the time the conduct occurs.

(2) If, with respect to any claim brought by a person under the antitrust laws against any of the persons to whom a certificate of review is issued, the court finds that—

(A) the conduct alleged to violate the antitrust laws does not violate the antitrust laws,

(B) the conduct is conduct specified in a certificate of review, and

(C) the certificate of review was in effect at the time the conduct occurred, he court shall award to the person against whom the claim is brought the cost of suit attributable to defending against the claim, including a reasonable attorney's fee.

(c) None of the persons to whom a certificate of review is issued shall be liable under section 16 of the Clayton Act with respect to threatened loss or damage by a violation of the antitrust laws if the threatened loss or damage arises from conduct specified in the certificate of review and if the certificate is in effect at the time the conduct occurs.

INJUNCTIVE RELIEF

SEC. 10. Except as provided in section 9(c), a certificate of review shall have no legal effect on the authority of a court to grant equitable relief in an action for a violation of the antitrust laws brought against any of the persons to whom the certificate is issued. In granting the relief, the court shall have jurisdiction to modify or revoke the certificate of review, as may be appropriate.

DISCLOSURE OF INFORMATION

SEC. 11. (a) Information submitted by any person in connection with the issuance, amendment, or revocation of a certificate of review shall be exempt from disclosure under section 552 of title 5, United States Code.

(b)(1) Except as provided in paragraph (2), no officer or employee of the United States shall disclose commercial or financial information submitted in connection with the issuance, amendment, or revocation of a certificate of review if the information is privileged or confidential and if disclosure of the information would cause harm to the person who submitted the information.

(2) Paragraph (1) shall not apply with respect to information disclosed—

(A) upon a request made by the Congress or any committee of the Congress,

(B) in a judicial or administrative proceeding,

(C) with the consent of the person who submitted the information,

(D) in the course of making a determination with respect to the issuance, amendment, or revocation of a certificate of review, if the Attorney General deems disclosure of the information to be necessary in connection with making the determination,

(E) in accordance with any requirement imposed by a statute of the United States, or

(F) in accordance with any rule issued under section 13 permitting the disclosure of the information to an agency of the United States or of a State on the condition that the agency will disclose the information only under the circumstances specified in subparagraphs (A) through (E).

DESCRIPTIVE GUIDELINES

SEC. 12. (a) To promote greater certainty regarding the application of the antitrust laws to joint research and development programs, the Attorney General may issue guidelines—

(1) describing specific types of conduct with respect to which the Attorney General has made, or would make, determinations under section 5 and section 7, and

(2) summarizing the factual and legal bases in support of the determinations.

(b) Section 553 of title 5, United States Code, shall not apply to the issuance of guidelines under subsection (a).

ISSUANCE OF RULES

SEC. 13. Not later than ninety days after the date of the enactment of this Act, the Attorney General shall issue rules to carry out this title.

DEFINITIONS

SEC. 14. For purposes of this title—

(1) the term "antitrust laws" shall have the meaning given it in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12(a)), except that the term shall include section 5 of the Federal Trade Commission Act (15 U.S.C. 45) to the extent that section 5 applies to unfair methods of competition,

(2) the term "Attorney General" means the Attorney General of the United States or his designee,

(3) the term "certificate of review" means a certificate issued by the Attorney General under section 5,

(4) the term "research and development program" means a program for—

(A) theoretical analysis, exploration, or experimentation, or

(B) the extension of investigative findings and theories of a scientific or technical nature into practical application for experimental and pilot demonstration purposes, including the experimental production and testing of models, devices, equipment, materials, and processes,

except that the conduct of such program may include the establishment of facilities for the conduct of research, the collecting and exchange of research information, the conduct of research on a protected and proprietary basis, the prosecution of applications for patents and the granting of licenses, and the establishment of corporations to exploit patents, and

(5) the term "State" shall have the meaning given it in section 4G of the Clayton Act (15 U.S.C. 15g).

EFFECTIVE DATE

Sec. 15. (a) Except as provided in subsection (b), this title shall take effect on the date of the enactment of this Act.

(b) Section 4 and section 5 shall take effect ninety days after the effective date of the rules first issued under section 13.

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Lee Peachey, Ph.D.
Hon. Warren Rudman
Richard Sackler, M.D.
Edgar Smith, Ph.D.
Hon. Adlai Stevenson III
Hon. Paul Tsongas
Mitzi Wertheim
Linda Wilson, Ph.D.
Michael I. Yarymovych, Ph.D.
LEGAL COUNSEL
Mark L. Rosenberg

Testimony of

GITTA KURLAT

Representing the
National Coalition for Science and Technology

Before the
Subcommittee on Science, Research and Technology
House Committee on Science and Technology

Washington, D.C.
July 12, 1983

Mr. Chairman, my name is Gitta Kurlat. I am the vice president of the Eikonix Corp., a small high-technology company in Bedford, Mass. I also am a partner in the law firm of Guterman, Horwitz, Rubin & Rudman.

Today, I am testifying on behalf of the National Coalition for Science and Technology (NCST) on whose advisory board I serve. The statement I am presenting has been prepared in consultation with a task force of the Coalition's advisors, and these individuals are identified in an appendix to my testimony.

NCST is an organization of scientists, educators, businesspeople and engineers who are deeply concerned about the state of science education and research, and industrial productivity in America. NCST's membership includes individuals, corporations and professional societies cutting across the spectrum of science and technology.

In general, we support amending the antitrust laws to facilitate joint research ventures. However, we would like to suggest some modifications to the pending legislation. Before making specific comments on HR1952 and similar bills, I would like to explain why we believe joint research ventures are important and why we support new legislation.

Mr. Chairman, our society has moved rapidly into an era of high-technology industries. Microelectronics and computers come most readily to mind, but we can look also at biotechnology, aerospace, energy and other fields. In all of these areas, there is a dramatic increase in research expenses as we move from one level of technological development to the next. Furthermore, we must recognize that technological advances are increasingly dependent upon progress in basic science. In these new, high-technology industries, there is a very fast transfer from basic research to applied technology.

Our nation's traditional approach to R&D, that of numerous companies pursuing parallel research programs, may not be adequate to meet the research requirements of these new technologies. First, there is the simple fact that as the cost of the research rises steeply, the number of companies who are capable of making such investments drops rather quickly. Second, there is only a limited number of researchers trained to conduct advanced research in certain sophisticated technologies. Finally, we have to look at what our foreign competitors are doing.

In many instances, we find American companies that are relatively large within their respective industries competing against foreign companies that are affiliated with much larger conglomerate-type organizations. Moreover, some foreign governments encourage their private industry to pool research resources.

So, there is a growing imbalance between the resources U.S. companies are able to devote to specific research projects and what their foreign competitors are able to do. Even domestically, there is a growing disparity between the research capabilities of our very largest corporations versus those of even the second or third tier companies. Smaller businesses already are being priced out of basic research in some technologies.

Joint research ventures make sense. They allow firms to share costs and pool resources for R&D projects that are bigger and more complex than they could undertake individually. They help make more efficient use of limited resources, and they help offset the effects of differences in corporate size and resources.

We already have some examples of joint research ventures in the United States. This Committee has already heard testimony about the new Microelectronics and Computer Technology Corporation (MCC) and the Semiconductor Research Cooperative. You also are familiar with the various joint ventures that have been proposed for the development of new energy technologies. These are the exceptions, though; not the rule.

A number of legal questions remain. Some large companies, with a great deal of legal talent available to them, have gone ahead and risked establishing joint research ventures. Although the Justice Department has given its blessing to MCC, for example, that venture already has been threatened by civil litigation. Smaller companies, who do not have such extensive legal resources, are understandably reluctant to expose themselves to lengthy and expensive antitrust litigation.

The key legal factor encouraging joint research ventures lately has been the Reagan administration's perceived lenient attitude toward the antitrust laws. Personally, I would be very reluctant to advise a client to make a major long-term investment based upon the discretionary and reversible opinions of political appointees. That is a very risky proposition.

Before we can expect to see more companies, expecially smaller-sized firms, investing in joint research ventures, there must be a clearly-defined set of guidelines as to what is allowable under the antitrust laws. And there must be a reasonable assurance against litigation if those standards are met.

We believe there are valid reasons why the government should be concerned about the potential for antitrust problems growing out of joint ventures. Those problems can be avoided, and the public's interest protected, if legislation like that proposed by Congressman Synar and Senator Mathias (HR 1952/S 737) or by Senator Tsongas (S 568) is adopted.

Mr. Chairman, the following describes the general principles the National Coalition for Science and Technology believes should be applied in evaluating proposed ligislation to amending the antitrust laws affecting joint research ventures. Based upon these principles, we do recommend some changes be made in HR 1952, the bill which is before this subcommittee.

The National Coalition for Science and Technology believes that any legislation amending the federal antitrust laws to facilitate joint research ventures should incorporate all of the following points.

* Strictly limit the joint venture to R&D only; no manufacturing or marketing of products.
* Allow flexibility in structuring contribution requirements, to encourage participation by smaller firms.
* Assure all participants of a venture equal access to research results.
* Require prior review of the proposed venture by government officials.
* Require expeditious handling of any request for government review.
* Preserve the right to bring civil action under the antitrust laws, but limit liability to simple damages if a sanctioned joint venture is involved.

In looking at existing legislation for models that might be followed, we found the pre-merger notofication requirement in the Hart-Scott-Rodino Act. That law requires certain corporations who are about to merge to notify the Justice Department and the Federal Trade Commission. Those agencies then have 30 days in which they may either clear the merger or request further information.

If additional information is requested, the merger is postponed until 30 days after the government has received the new data. The government thus is subject to strict time limits, yet the corporations also are encouraged to have everything in order when they come in.

A similar regulatory approach to proposed joint ventures would provide businesses with the quick prior approval they need. Once the government has certified that the proposal meets the necessary standards, then the companies involved are entitled to relief from the threat of triple-damages suits.

Applying these principles to the Synar/Mathias legislation pending before this Subcommittee, we have the following suggestions for improving HR 1952.

First, we believe the bill's requirement that participating firms shall participate on comparable terms is good and reflects our desire to see equity amongst the partners. However, we feel the legislation should be clearer on the point that firms entering the venture need not do so on identical terms. For example, while one firm may contribute money to a venture, another could provide materials or facilities, while a third might loan some employees to the project.

Similarly, we feel the bill's definition of a participant should be expanded to allow academic institutions and non-profit organizations to be partners in joint research ventures. A further melding of basic research done on campuses and the applied technology approach of industry is inevitable in the frontier areas of high technology.

Second, the idea of requiring "outside directors" on the venture's management board is good, as it helps represent the broader public interest. We would go further and suggest that the board be required to file periodic statements attesting that the venture is adhering to the antitrust guidelines and its original proposal. As the legislation stands now, the only means for review after a venture is launched would be through litigation or criminal investigation.

Third, we question the wisdom of the self-certification process that would be available to some joint ventures. We feel that all joint research ventures, regardless of who their participants may be, should be subject to prior review by the government, as they are seeking shelter from public laws. Moreover, it is difficult to define with precision who has what share of rapidly changing international markets for new technologies.

Fourth, we applaud the bill's feature requiring licensing of new technologies after a period of time. There is a gray area in the bill, though. As it is now written, HR 1952 requires public licensing within three years after participating firms have licensed an invention. Our question is: what happens to those inventions which the participating firms choose not to license themselves?

Fifth, we do not like the bill's provision that participants may be rewarded in proportion to their participation. We believe all participants should have equal access to all benefits of the venture's activities. In research, the breakthrough could come in an inspiration provided by the smallest participant as well as the largest.

Mr. Chairman, suggestions we have made are intended to further enhance what we regard as a basically good piece of legislation. The National Coalition for Science and Technology believes that joint research ventures are a practical solution to a serious problem and they should be encouraged. We urge the committee to approve HR 1952 or comparable legislation.

Appendix

The following members of NCST's Board of Advisors served on the ad hoc task force on antitrust laws affecting joint research ventures. Affiliations are listed for the purposes of identification only.

Samuel Cardon- pres., General Technical Services, Inc.; pres. American Association of Small Research Companies.
Gitta Kurlat- practicing attorney; v.p., Eikonix Corp.; former v.p., Mass. Bar Association.
Carl Modecki- executive v.p., Consumer Bankers Association.
Arthur Obermayer- pres. and chair., Moleculon Research Corp.; member, National Advisory Council, Senate Small Business Committee; Chair., NE Section, American Chemical Society.
Warren Rudman- U.S. Senator(R-NH); chair., Subcommittee on Innovation and Technology.
Adlai Stevenson, III- practicing attorney; former chair., Senate Subcommittee on Science.
Mitzi Wertheim- mgr., Strategic Services, IBM; former deputy undersecretary of the Navy.
Linda Wilson- assoc. v. chancellor for research, U. of Illinois, Urbana-Champaign.

THE NATIONAL PRODUCTIVITY AND INNOVATION ACT AND RELATED LEGISLATION

WEDNESDAY, OCTOBER 26, 1983

U.S. Senate,
Committee on the Judiciary,
Washington, D.C.

The committee met, pursuant to notice, at 10:13 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the full committee) presiding.

Staff present: W. Stephen Cannon, chief counsel for antitrust; Sara S. Rogers, senior counsel; and Joseph H. Gibson, committee staff.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The Chairman. The committee will come to order.

Today the committee begins hearings on S. 1841, the National Productivity and Innovation Act of 1983. This legislation was sent to the Congress by the President on September 13, 1983, and introduced by me at the President's request on September 14, 1983. Congressman Moorhead has introduced companion legislation in the House.

In his transmittal message to the Congress, the President noted that "the ability of the United States to improve productivity and industrial competitiveness will * * * depend largely on our ability to create and develop new technologies." In the President's opinion, S. 1841 embodies appropriate clarifications in our antitrust laws to greatly stimulate private sector research and development.

One section of S. 1841 addresses the antitrust implications of research and development joint ventures. While there are four other bills in our committee that address this issue, they all have a common goal: Clarification of when the antitrust laws apply to research and development joint ventures. The proponents of this legislation argue that our antitrust laws currently inhibit joint research and development and thus contribute to the decline in international competitiveness of the United States in many product markets. Critics of the legislation say that the assumption that our antitrust laws are to blame for this decline is erroneous and that no change is needed. It is the job of our committee to evaluate these various arguments to determine whether there is a need for such legislation, and if so, what form it should take.

The remaining titles of the President's bill deal with intellectual property licensing, patent and copyright misuse, and process patents. The stated rationale behind these titles is that those who utilize their resources in speculative research activities should be appropriately rewarded for their effort.

As chairman of the committee, I welcome the opportunity to study S. 1841 and pledge that it will receive full and fair consideration.

We are pleased to have so many distinguished representatives of the administration with us today and look forward to their testimony. Our next hearing on this legislation is tentatively scheduled for November 9.

[The prepared statement of Senator Robert Dole and the text of S. 1841 follow:]

PREPARED STATEMENT OF SENATOR ROBERT DOLE

Mr. Chairman, I commend you for holding these hearings on S. 1841, the President's proposed National Productivity and Innovation Act. America today faces serious challenges to its technological leadership and competitiveness in the world market. The modifications to our antitrust and intellectual property laws proposed in S. 1841 can help meet those challenges.

While S. 1841 contains a number of important reforms, I would like to focus my remarks on title II of the bill, which is designed to promote and encourage joint research and development ventures by removing unnecessary deterrents to undertake such ventures which currently exist under our antitrust laws. The approach embodied in title II is basically the same as that contained in a bill I introduced last summer: S. 1561, the National Joint Research and Development Policy Act.

Clearly, one important thing we can do to strengthen America's international competitive position is stimulate collaborative research and development efforts among U.S. firms. By permitting firms to pool their resources and share the risks, such ventures can lead to important advances in new technology, which otherwise could not be achieved because of excessive risk of cost to the individual firm. Joint R&D ventures can also promote the rapid and wide dissemination of new technology and increase efficiency in the use of resources, particularly scarce scientific and engineering talent.

U.S. firms, however, have consistently expressed reluctance to invest in joint R&D ventures because of the threat of an antitrust challenge. For there is no guarantee that all courts will properly weight the important procompetitive benefits of such ventures in determining whether they violate the antitrust laws. The problem is compounded by the fact that the law currently creates a bias in favor of litigation by entitling successful antitrust plaintiffs to three times the actual damages they have suffered.

Both S. 1841 and my bill would remove these unnecessary deterrents to joint R&D activities, while maintaining strong protections for the consumer against actual anticompetitive conduct. Specifically, both bills would clarify that joint R&D ventures are not unlawful, per se, under the antitrust laws. Both bills further provide that a joint R&D venture which has been fully disclosed to the Department of Justice may be liable only for the actual damages caused by its conduct if the court finds a violation.

There are a number of other proposals now pending in the committee which also seek to eliminate unnecessary antitrust disincentives to beneficial joint R&D. Some would set up a Justice Department certification system to provide an antitrust immunity for qualified joint R&D ventures. Another would grant such ventures antitrust immunity if they meet certain specified criteria relating to such factors as the venture's participation requirements, organization, and activities. All of these proposals have a worthy objective: To stimulate the development of new technologies by encouraging collaborative R&D activities. However, I believe that the principal advantage of the approach taken in S. 1841 and my bill is that it seeks to achieve this objective with the least amount of bureaucracy and governmental interference in the private market.

II

98TH CONGRESS
1ST SESSION

S. 1841

To promote research and development, encourage innovation, stimulate trade, and make necessary and appropriate amendments to the antitrust, patent, and copyright laws.

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 14 (legislative day, SEPTEMBER 12), 1983

Mr. THURMOND (by request) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To promote research and development, encourage innovation, stimulate trade, and make necessary and appropriate amendments to the antitrust, patent, and copyright laws.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I—SHORT TITLE

SEC. 101. This Act may be cited as the "National Productivity and Innovation Act of 1983".

TITLE II—JOINT RESEARCH AND DEVELOPMENT VENTURES

SEC. 201. For purposes of this title—

(1) the term "joint research and development program" means—

(A) theoretical analysis, exploration, or experimentation; or

(B) the extension of investigative findings and theories of a scientific or technical nature into practical application, including the experimental production and testing of models, devices, equipment, materials, and processes;

to be carried out by two or more independent persons: *Provided,* That for purposes of this title, such a program may include the establishment of facilities for the conduct of research, the collecting and exchange of research information, the conduct of research on a protected and proprietary basis, the prosecution of applications for patents, the granting of licenses, and any other conduct reasonably necessary and appropriate to such program;

(2) the term "antitrust laws" has the meaning given it in section 1 of the Clayton Act (15 U.S.C. 12), except that the term shall also include section 5 of the Federal Trade Commission Act (15 U.S.C. 45) to the extent that said section 5 applies to unfair methods of competition;

(3) the term "Attorney General" means the Attorney General of the United States; and

(4) the term "Commission" means the Federal Trade Commission.

SEC. 202. No joint research and development program shall be deemed illegal per se in any action under the antitrust laws.

SEC. 203. (a) Notwithstanding the provisions of section 4 of the Clayton Act (15 U.S.C. 15), any person entitled to recovery in an action under said section 4 based on conduct that is part of a research and development program and that is engaged in after a notification disclosing such conduct has been filed with the Attorney General and the Commission pursuant to section 204 shall recover the actual damages by him sustained, interest calculated in accordance with the provisions of section 1961 of title 28, United States Code, on such actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, such interest to be adjusted by the court if it finds that the award of all or part of such interest is unjust in the circumstances, and the cost of suit, including a reasonable attorney's fee.

(b) Notwithstanding the provisions of section 4C of the Clayton Act (15 U.S.C. 15c), any State entitled to monetary relief in an action under said section 4C based on conduct that is part of a research and development program and that is engaged in after a notification disclosing such conduct has been filed with the Attorney General and the Commission pursuant to section 204 shall be awarded as monetary relief the total damage sustained as described in paragraph (1) of subsection (a) of said section 4C, interest calculated in accordance with the provisions of section 1961 of title 28, United States Code, on such total damage for the period beginning on the date of service of such State's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, such interest to be adjusted by the court if it finds that the award of all or part of such interest is unjust in the circumstances, and the cost of suit, including a reasonable attorney's fee.

SEC. 204. (a) Any person participating in a joint research and development program may file with the Attorney General and the Commission a notification disclosing such program. Such notification shall specify the identity of the parties participating in the program, the nature, scope, and duration of the program, and any and all ancillary agreements or understandings. Only conduct specified in a notification filed pursuant to this section shall be entitled to the protections of section 203.

(b)(1) Except as provided in subsection (d), within thirty days of the filing of any notification pursuant to this section, the Commission shall cause to be published in the Federal Register notice of such notification, describing in general terms the participants, the program, and its objectives.

(2) Except as provided in subsections (c) and (d), all information and documentary material submitted as part of a notification filed pursuant to this section shall be available to the public upon request within thirty days after their submission to the Attorney General and the Commission.

(c) Any person filing a notification pursuant to this section may request that information or documentary material submitted as part of such notification not be made public. Any such request shall specify precisely what information or documentary material should not be made public, state the minimum period of time during which nondisclosure to the public is considered necessary, and justify the request for nondisclosure to the public both as to content and time. The Attorney General and the Commission shall consult with one another with respect to any such request, and each in its sole discretion shall make a final determination as to whether good cause for nondisclosure to the public has been shown. Any information or documentary material that is withheld from disclosure to the public pursuant to this subsection shall be exempt from disclosure under section 552 of title 5, United States Code.

(d) Any person who has filed a notification pursuant to this section may withdraw such notification prior to the time at which notice of such notification is published in the Federal Register and information and documentary material submitted as part of such notification is made publicly available pursuant to subsection (b). Any notification so withdrawn shall have no force or effect, notice of such notification shall not be published in the Federal Register, and no information or documentary material submitted as part of such notification shall be made publicly available.

(e) Actions taken or not taken by the Attorney General or Commission in response to or with respect to notifications filed pursuant to this section, including without limitation determinations regarding the content of notices published or to be published in the Federal Register pursuant to subsection (b), the withholding from public disclosure of information or documentary material pursuant to subsection (c), and whether to institute antitrust or other investigations or enforcement actions shall not be subject to judicial review.

TITLE III—INTELLECTUAL PROPERTY LICENSING UNDER THE ANTITRUST LAWS

SEC. 301. The Clayton Act, as amended (15 U.S.C. 12 et seq.), is amended by renumbering section 27 as section 28 and by adding the following new section 27:

"SEC. 27. (a) Agreements to convey rights to use, practice, or sublicense patented inventions, copyrights, trade secrets, trademarks, know-how, or other intellectual property shall not be deemed illegal per se in actions under the antitrust laws.

"(b)(i) Notwithstanding the provisions of section 4 of this Act, any person entitled to recovery in an action under said section 4 based on an agreement described in subsection (a) of this section shall recover the actual damages by him sustained, interest calculated in accordance with the provisions of section 1961 of title 28, United States Code, on such actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, such interest to be adjusted by the court if it finds that the award of all or part of such interest is unjust in the circumstances, and the cost of suit, including a reasonable attorney's fee.

"(ii) Notwithstanding the provisions of section 4C of this Act, any State entitled to monetary relief in an action under said section 4C based on an agreement described in subsection (a) of this section shall be awarded as monetary relief the total damage sustained as described in paragraph (1) of subsection (a) of said section 4C, interest calculated in accordance with the provisions of section 1961 of title 28, United States Code, on such total damage for the period beginning on the date of service of such State's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, such interest to be adjusted by the court if it finds that the award of all or part of such interest is unjust in the circumstances, and the cost of suit, including a reasonable attorney's fee.".

TITLE IV—PATENT AND COPYRIGHT MISUSE

SEC. 401. Section 271 of title 35, United States Code, is amended—

(a) by redesignating subsection (c) as paragraph (c)(1);

(b) by redesignating subsection (d) as paragraph (c)(2); and

(c) by adding the following new subsection (d):

"(d) No patent owner otherwise entitled to relief for infringement or contributory infringement of a patent shall be denied relief or deemed guilty of misuse or illegal extension of the patent right by reason of his having done one or more of the following, unless such conduct, in view of the circumstances in which it is employed, violates the antitrust laws: (1) licensed the patent under terms that affect commerce outside the scope of the patent's claims, (2) restricted a licensee of the patent in the sale of the patented product or in the sale of a product made by the patented process, (3) obligated a licensee of the patent to pay royalties that differ from those paid by another licensee or that are allegedly excessive, (4) obligated a licensee of the patent to pay royalties in amounts not related to the licensee's sales of the patented product or a product made by the patented process, (5) refused to license the patent to any person, or (6) otherwise used the patent allegedly to suppress competition.".

SEC. 402. Subsection (a) of section 501 of title 17, United States Code, is amended by adding at the end thereof the following: "No copyright owner otherwise entitled to relief for infringement of a copyright under this title shall be denied relief or deemed guilty of misuse or illegal extension of the copyright by reason of his having done one or more of the following, unless such conduct, in view of the circumstances in which it is employed, violates the antitrust laws: (1) licensed the copyright under terms that affect commerce outside the scope of the copyright, (2) restricted a licensee of the copyright in the sale of the copyrighted work, (3) obligated a licensee of the copyright to pay royalties that differ from those paid by another licensee or that are allegedly excessive, (4) obligated a licensee of the copyright to pay royalties in amounts not related to the licensee's sales or use of the copyrighted work, (5) refused to license the copyright to any person, or (6) otherwise used the copyright allegedly to suppress competition.".

TITLE V—PROCESS PATENTS

SEC. 501. Section 154 of title 35, United States Code, is amended by inserting after "invention" the second time it appears the words ", and if the invention is a process of the right to exclude others from using or selling products produced thereby,".

SEC. 502. Section 271 of title 35, United States Code, is amended—

(a) by redesignating subsection (a) as paragraph (a)(1); and

(b) by inserting the following new paragraph (a)(2):

"(a)(2) If the patented invention is a process, whoever without authority uses or sells in the United States during the term of the patent therefor a product produced by such process infringes the patent.".

SEC. 503. Title 35, United States Code, is amended by adding the following new section 295:

"§ 295. Presumption: Product Produced by Patented Process.

"In actions alleging infringement of a process patent based on use or sale of a product produced by the patented process, if the court finds (1) that a substantial likelihood exists that the product was produced by the patented process and (2) that the claimant has exhausted all reasonably availa-

ble means through discovery or otherwise to determine the process actually used in the production of the product and was unable so to determine, the product shall be presumed to have been so produced, and the burden of establishing that the product was not produced by the process shall be on the party asserting that it was not so produced.".

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The CHAIRMAN. We have a number of witnesses today, and I am going to have to leave at 10 minutes to 11 to go to the White House to meet with the President so I hope we can get the witnesses to summarize. We will put their entire statements in the record.

We are honored to have a member of the President's Cabinet today, one of the ablest members of the President's Cabinet, the Honorable Malcolm Baldrige, Secretary of Commerce.

Mr. Secretary, we would be pleased to hear from you at this time.

STATEMENT OF HON. MALCOLM BALDRIGE, SECRETARY OF COMMERCE, WASHINGTON, D.C.

Secretary BALDRIGE. Thank you, Mr. Chairman. I will just read a summary of the statement as you requested. The bill, the National Productivity and Innovation Act of 1983, constitutes the administration's proposal to modify the Federal antitrust and intellectual property laws in ways that will improve productivity, and enhance the competitiveness of U.S. industries in international markets.

I strongly support all parts of this bill and think that the enactment of all titles of this legislation is a matter of very high priority. Title III of the bill will insure that antitrust laws encourage procompetitive intellectual property licensing as a means of spreading new knowledge, which greatly enhances our economy's ability to develop and commercialize technology.

Title IV of the bill similarly encourages the procompetitive use of intellectual property. The courts will be able to refuse to enforce a valid patent or copyright because of misuse only after considering the economic ramifications.

And finally, title V of the bill increases Federal protection for process patents. Currently, if someone violates the process patent outside the country and the resulting product is then imported into the United States, and that happens, Mr. Chairman, all the time, the importer is not guilty of violating patent law. Our bill closes this loophole.

Commissioner Mossinghoff will testify later today on titles III through V which deal with changes in our intellectual property laws. My testimony today will focus on title II of the administration bill which deals with amendments to the antitrust laws pertaining to research and development joint ventures.

Joint research and development programs have many procompetitive aspects. They reduce duplication, promote the efficient use of scarce technical personnel and help to achieve desirable economies of scale.

Small firms are able to collaborate in joint research and development projects which, because of prohibitive costs, they cannot finance by themselves. And large firms working jointly are able to tackle projects which, because of large and complex technological problems, are often beyond the ability of single firms.

Joint R&D ventures are key factors in the ability of countries to stay competitive in the international marketplace. Our major trading partners have focused collaborative efforts on research and development in high technology industries.

It is essential to our long-term economic well being that U.S. industries have the same opportunities to engage in joint research and development as our competitors. U.S. firms, however, have consistently expressed the view that they are handicapped in competing in international markets because our antitrust laws inhibit joint research and development.

U.S. firms say they are hesitant to invest heavily in joint research and development projects because of the risk of treble damages. Mr. Chairman, the risk of treble damage liability has inhibited collaborative R&D and placed U.S. industry at a disadvantage in the international marketplace. It should be removed.

Title II of the administration bill contains what I believe to be the essential elements needed for reform of the antitrust laws governing joint R&D. Reform will put the U.S. firms on a parity with their international competitors.

The bill promotes R&D joint ventures by removing treble damage penalties and thus limiting the liability to actual damages. Further, the bill directs that in antitrust actions challenging R&D joint ventures, the courts must weigh the procompetitive benefits of the venture against any anticompetitive effects in a rule of reason analysis.

The administration bill contains only one condition for an R&D venture to enjoy the antitrust protection described above. That condition requires the venture to be fully disclosed to the Department of Justice and the FTC but does not require any certification or approval by Justice.

The administration bill contains no restrictions on the length of joint R&D programs, on the way they are organized, on who shall be the eligible participants. It does not require mandatory licensing of the resulting patents.

The alternative approach, stipulating conditions for acceptable joint R&D ventures, would be contrary to the administration's policy of minimizing government intervention in private sector activities.

All that should be necessary and all that our bill requires is notification to the government of the participants of the joint venture company accompanied by a description of the R&D to be undertaken and by any agreements between the participants.

Further, title II of the administration bill makes the least change possible in the antitrust laws needed to encourage more joint R&D. It does not change the antitrust law's impact on marketing strategies or on the actual sale of products. Consumers would not be affected. Attempts to monopolize would still be subject to the Sherman Act as would price fixing and so forth.

Mr. Chairman, this concludes my testimony. I will be pleased to answer any questions.

[The prepared statement of Secretary Baldrige:]

PREPARED STATEMENT OF MALCOLM BALDRIGE

Mr. Chairman and members of the Committee, thank you for this opportunity to express my views on S. 1841, the National Productivity and Innovation Act of 1983. This bill constitutes the Administration's proposal to modify the Federal antitrust and intellectual property laws in ways that will stimulate this country's productivity and enhance the competitiveness of U.S. industries in international markets.

One of the most important goals of this Administration has been the revitalization of the competitiveness and productivity of American industry through a resurgence of R&D. The President's program to accomplish this goal has included the tax cuts enacted during the 97th Congress. Among these were a variety of tax incentives to promote private sector productivity and technology growth, particularly the R&D tax credit. As part of the program, the Administration has also moved to bolster research and development in the public sector as illustrated by the 1984 budget proposal to increase Federal funding for R&D by 17 percent, to $47 billion. These elements of the Administration's general economic program have laid the foundation for a period of strong and sustained technical progress.

The National Productivity and Innovation Act of 1983 would carry the program a step further. By removing deterrents in antitrust laws that inhibit joint R&D and by preserving the rights of innovators to legitimate rewards, the proposal will strengthen incentives for industry to create and develop new technology. Title II of the bill will ensure that antitrust laws do not unnecessarily inhibit the formation of procompetitive joint R&D ventures; it will encourage U.S. industry to conduct the joint R&D programs essential for this nation's competitiveness in international markets. Title III of the bill will ensure that antitrust laws encourage procompetitive intellectual property licensing, a means of spreading new knowledge which greatly enhances our economy's ability to develop and commercialize technology. Title IV of the bill similarly encourages the procompetitive use of intellectual property. Enforcement of a valid patent or copyright because of misuse could be denied only after consideration of the economic ramifications. Finally, Title V of the bill increases Federal protection for process patents. Currently, if somebody violates a process patent outside the country and the resulting product is then imported into the United States, the importer is not liable for violation of the patent law. Our bill closes this loophole, permitting the owners of process patents to prevent such unauthorized use of their technology.

I strongly support all parts of the Administration bill. I consider enactment of all titles of this legislation to be a matter of high priority. The remainder of my testimony today will focus on Title II of the Administration bill, which deals with amendments to the antitrust laws pertaining to research and development joint ventures. Commissioner Mossinghoff will testify later today on Titles III through V, which deal with changes in our intellectual property laws.

Need for Amendments to the Antitrust Laws

Joint research and development programs have many procompetitive aspects. They reduce duplication, promote the efficient use of scarce technical personnel, and help to achieve desirable economies of scale. Small firms are able to collaborate in joint research and development projects, which, because of prohibitive costs, they cannot fund by themselves. Large firms, working jointly, are able to tackle projects which, because of large and complex technological problems, are often beyond the ability of single firms. For all of these reasons, joint research efforts can help to stimulate domestic competition and thus are key factors in the ability of U.S. firms to stay competitive in the international marketplace.

Joint research and development ventures are key factors in the ability of countries to stay competitive in the international marketplace. Our major trading partners have focused collaborative efforts on research and development in high technology industries. Through permissible arrangements under their antitrust laws these countries and the European Economic Community have targeted for intensive joint research and development certain hi-tech industries, where the U.S. now has, or has had, a technological lead. As a result, our foreign competitors have been able to narrow the gap in many of these industries.

It is essential to our long-term economic well-being that U.S. industries be able to engage in joint research and development in order to respond effectively to as our competitors in world markets. U.S. firms, however, have consistently expressed the view that they are handicapped in competing in international markets because our antitrust laws inhibit joint research and development. U.S. firms say they are hesitant to invest heavily in joint research and development projects because of the risk of treble damages under existing antitrust law.

Mr. Chairman, the risk of treble damage liability that has inhibited collaborative R&D and placed U.S. industry at a disadvantage in the international marketplace should be removed. Title II of the Administration bill contains what I believe to be the essential elements needed for reform of the antitrust laws governing joint R&D. These reforms will enable U.S. firms to compete effectively with their international competitors. The bill promotes procompetitive R&D joint ventures by removing the treble-damage penalty and thus limiting liability to actual damages plus prejudgment interest. Further, the bill directs that in antitrust suits challenging R&D joint ventures, the courts must weigh the procompetitive benefits of the venture against any anticompetitive effects in a "rule of reason" analysis.

The Administration bill contains only one condition for an R&D venture to enjoy the antitrust protection described above. That condition requires the venture to be fully disclosed to the Department of Justice and the FTC, but does not require any certification or approval by Justice. The Administration bill thus provides only an enforcement role for the Attorney General, and would not require that official to issue certificates, and thus assume a regulatory role inconsistent with that of enforcing the antitrust laws.

The Administation bill includes no restrictions on the length of joint R&D programs, on the way they are organized or on who shall be eligible participants. It does not require mandatory licensing of resulting patents. The alternative approach, stipulating conditions for acceptable joint R&D ventures, would be contrary to this Administration's policy of minimizing Government intervention in private sector activities. All that should be necessary, and all that our bill requires, is notification to the Government of the participants of a joint venture, accompanied by a description of the R&D to be undertaken and by any agreements between the participants. This approach requires a minimum of paperwork for both the government and the private sector.

Further, Title II of the Administration bill makes the least change possible in the antitrust laws needed to encourage more joint R&D. Title II does not change the antitrust laws' impact upon marketing strategies or the actual sale of products.

Consumers would not be affected since all illegal marketing activities, such as price fixing, would continue to feel the full weight of this nation's antitrust laws. Attempts to monopolize would still be subject to the Sherman Act.

In conclusion, I want to repeat my view that enactment of this legislation is of great importance. It is an essential element of the Administration's program to enhance the competitiveness of U.S. firms in world markets. The clarifications and modifications in the antitrust and intellectual property laws proposed by the Administration will strongly encourage innovation in the United States and thus the competitiveness and productivity of American industry.

The CHAIRMAN. Thank you, Mr. Secretary.

Mr. Secretary, if the joint research and development provisions of S. 1841 were to become law, what is your expectation of how much they would be used and more specifically in what industries would this law do the most good?

Secretary BALDRIGE. Well, it is difficult, Mr. Chairman, to be specific about how much or how many joint ventures this would encourage; I think it is very important to note that among our larger companies that are locked in a global competitive battle with other large companies in some of the most complex, highly technical kinds of new research and developing of new products, it would mean a great deal to jobs in this country.

The scale of modern technology has gotten large enough so that even single large companies find projects that they cannot tackle or will not tackle, because they do not have the necessary financial ability.

And we see joint ventures, as a result, among companies from one country along with another. I would like to see American companies have that same privilege. I think it would encourage more efforts like we are seeing in the computer business, and in telecommunications. As the complexity of these gets larger, the R&D cost gets larger and the personnel to run them gets more limited. Therefore, combinations allowed under this bill would be most helpful.

And I think also they would help small companies a great deal. There is provision in section 9 of the Small Business Act for the Administrator of the SBA to grant total antitrust immunity to joint R&D ventures among qualifying small businesses. However, the process needed to get that clearance from the Justice Department is so time consuming and onerous that since the bill was passed in 1958 there has only been one effort made to apply for protection under it.

The simple solution in the administration's bill would, I think, greatly increase R&D joint ventures by small companies.

The CHAIRMAN. Thank you very much. I think that is all the questions I have, Mr. Secretary. We thank you for your presence here and the testimony you have given, and we feel it will be helpful.

Secretary BALDRIGE. Thank you, Mr. Chairman.

The CHAIRMAN. Our next witness is the Honorable William F. Baxter, Assistant Attorney General of the Antitrust Division of the Department of Justice.

Mr. Baxter, we are glad to have you with us. I notice your statement is about 20 pages which would take about 40 minutes to deliver. I wonder if you could take about 5 or 10 minutes and give us a résumé, and we will put your entire statement in the record.

STATEMENT OF HON. WILLIAM F. BAXTER, ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Mr. BAXTER. Thank you very much, Mr. Chairman. Yes, I will do that. Indeed, I will try to keep it as short as I can so that there is as much time for questions as is possible.

Rather than even try to summarize my statement, I think I would like to highlight the differences between the administration's bill and some of the other bills that have been introduced.

Needless to say, we think the approach taken in the administration's bill is superior. The other bills to which reference has been made are essentially counterparts to title II of our bill. They deal only with the collaborative R&D problem and not with the problem of incentives to do research and development singly or collaboratively.

We view titles III, IV, and V of the administration's bill as being very, very important. Research is very expensive to do in many areas of industrial activity. Its fruits are highly uncertain. Many, undoubtedly most, research projects yield no useful outputs whatsoever when the final accounting comes. The rate of return on successful projects must be high enough not only to cover the costs of the successful projects but high enough to carry the costs of all the unsuccessful research efforts. Yet the fruits of research are new bits of information. It is almost impossible to keep the fruits secret in most industrial settings and to use them at the same time, because they are subject to being copied by other firms in the industry. Therefore, in the absence of effective intellectual property protection, the prospect that research and development will ever have a favorable effect on a company's bottom line is very, very remote.

Our laws providing intellectual property protections are absolutely essential to the maintenance of private incentives to do research and development. But because of the way our intellectual property laws work—and work quite properly by conferring exclusive rights on people to take advantage of information they have created, information they have given us—the courts have tended to characterize intellectual property law as creating monopoly positions and have erroneously seen an inconsistency between intellectual property laws and the antitrust laws. As a consequence over the last 60 years not in one or two big dramatic opinions but in 40 or 50 flea-bite opinions, the courts have interpreted the antitrust laws so seriously as to undermine the efficacy of our intellectual property laws.

It is the intended purpose of titles III and IV in particular to urge the courts to take into account the benefits of licensing programs, and dissemination of technical information with which rewards for innovation cannot be earned and to address these problems other than through the rather rigid rules that have developed in this series of cases over the years.

We strongly urge the committee that any bill that addresses itself to the joint R&D problem also address itself to this intellectual property/antitrust interface problem as well.

As for the joint research and development problem, I would like to make three points. First, I see no reason why the procedural trappings that go beyond simple notification of a new joint venture are necessary. The overwhelming preponderance of joint ventures will be seen at a glance to pose no serious anticompetitive problems. A certification approach which is adopted in a number of these bills, requires an elaborate and expensive procedure with respect to all joint ventures notwithstanding that few, indeed, should be troublesome. I really think it is an expense not only for the Government but also for the private entities that will itself tend to deter use of this new vehicle that we are attempting to create.

Second, there is an effort in some of the bills to announce new substantive standards that would govern the propriety of these joint ventures displacing substantive antitrust law and implicitly, at least, state that hence forth antitrust rules will not have anything to do with joint ventures; they will be governed by these new statutory standards. None of the standards which are thus implicitly substituted are anywhere near sufficient to the task they undertake. In various respects, they are too sweeping, too immunizing and too restrictive.

In particular, one of the bills seems to be patterned on a particular recent joint venture in a particular industry and would control the size, shape, management of joint ventures far beyond any possible justification. Indeed, that device, in my opinion, would be totally useless in any industry except the industry in which we find the example that it copies.

The **Chairman.** Mr. Baxter, I have to leave here in 18 minutes. We have four more witnesses. I am going to let the questions be answered for the record. Could you sum up in about 1 minute?

Mr. **Baxter.** Yes, I can. The only other point I would make is the point about mandatory licensing. If, as some of these bills provide, it were necessary to afford access to all competitors after a very short period of time, the incentives to use these systems would, in my view, be completely destroyed. Only in the most extraordinary situations is it possible to reap the gains or, indeed, any significant portion of the gains of new information in a period as short as 3 or 4 or 5 years. So that I strongly urge that mandatory licensing be avoided. Indeed, it is the precise opposite of what is needed. What is needed is a strengthening of our intellectual property laws; mandatory licensing amounts to their destruction.

Let me desist at that point, Mr. Chairman. I would be happy to answer any questions.

The **Chairman**. Thank you very much. I may have a number of questions. I will ask that you answer these questions for the record, if that suits you.

Mr. **Baxter**. I will be happy to do that, Mr. Chairman.

The **Chairman**. Thank you very much, Mr. Baxter. We are glad to have you with us.

[The prepared statement of Mr. Baxter follows:]

PREPARED STATEMENT OF WILLIAM F. BAXTER

Mr. Chairman and members of the Committee:

I appreciate very much the opportunity to appear before the Committee to discuss proposals that would enhance American innovation, productivity, and efficiency in an increasingly competitive world. If this nation is to maintain its longstanding position of economic leadership, we must assure that American industry has the ability and incentive to keep pace with our overseas trading partners.

To these ends, the Administration has undertaken an extensive review of federal antitrust and intellectual property law and has devised a package of high priority reforms that should markedly improve the ability of the private sector to develop and market new technology. My remarks today will focus on the Administration's proposal, the National Productivity and Innovation Act of 1983, which you, Mr. Chairman, introduced as S. 1841. It is a bill that I hope will receive widespread support and early action.

Several other proposals regarding the application of the antitrust laws to joint R&D have been put before the Congress. S. 1841 contains some of the better features of these proposals and is, I believe, the best approach to the perception--I should say misperception--that the antitrust laws are somehow inconsistent with procompetitive joint R&D. But unlike most of the other proposals, S. 1841 does not stop short after addressing only joint R&D. It recognizes that industry's incentive to invest in R&D and its ability efficiently to apply new technology depend heavily on the laws that protect inventions and affect the marketing of those inventions. The National Productivity and Innovation Act of 1983 makes necessary reforms in those laws as well.

It is difficult to overstate the importance of new technology in today's economy. Like the industrial revolution of the last century, today's "technological revolution" is making profound changes in the way society provides the goods and services that its citizens demand. These changes are the hallmark of a healthy and growing economy. New technology increases the quantity, quality, and variety of goods and services available to satisfy the needs of consumers. New technology also enables society to produce goods and services far more efficiently--that is, using fewer of its increasingly scarce resources. By increasing efficiency and reducing costs, advances in technology increase productivity and reduce inflationary pressures. Technological growth thus plays a key role in improving the quality of life and in preserving the ability of American industry to stay competitive in international markets.

The development of new technology is an economically-risky undertaking. In recent years, R&D has become increasingly sophisticated and costly. And there is no guarantee that investment in costly research will result in profitable new technology. We all have heard of the spectacular breakthroughs that earn fortunes for their inventors. However, at times, R&D effort yields nothing that is commercially useful. Even more frequently R&D results only in minor technological improvements that are individually only marginally profitable, even though cumulatively they are essential to improving this nation's efficiency.

Because the essence of technology is information, and because it is difficult to prevent others from using information once it is created, even the creators of spectacular technological breakthroughs may be unable to earn a substantial return on their investment in R&D. "Free-riders" rather than the creators of technology are often able to appropriate the bulk of the economic benefits that result from the technology.

To overcome these problems of risk and free-riders, the United States and other countries have established the various regimes of intellectual property, which grant to the creators of new technology exclusive rights in their inventions. Intellectual property rights provide a market solution that enables inventors and innovators to obtain rewards for their R&D efforts that reflect the benefits that their efforts confer on society.

After a successful technology is created and provided with some form of intellectual property protection, the technology still must be commercially developed and applied before the inventor can earn his reward and society can realize the full benefits of that technology. Intellectual property laws also serve this end. They provide a legally-defined "commodity" that can be bought and sold in free markets. As a result, through contractual arrangements, an inventor can combine his intellectual property with the development, manufacturing, and distributional skills of others to bring goods and services that embody the new technology to the marketplace more quickly and at lower cost than otherwise would be possible.

The antitrust laws also have an important effect on the private sector's willingness and ability to create, develop and market new technologies. Vigorous competition to obtain profits is the factor that distinguishes our economic system, and the antitrust laws are the body of law that promotes and protects competition in the marketplace. Competition among the purchasers and sellers of goods and services generally assures efficient production, high quality and low prices. Similarly, competition in the area of R&D spurs market participants to create and develop new technologies that will give them an advantage over their competitors.

Cooperation among competitors, however, does not always violate the antitrust laws. While the antitrust laws are premised on the notion that a free economy is best served by vigorous competition, those laws are sensitive to the fact that, in some areas, cooperation among independent entities, even among competitors, may be fully consistent with competition and in fact necessary to maximize the well-being of consumers. The creation and development of technology is one very important area in which such cooperation frequently may be beneficial.

The antitrust laws also directly affect the rewards that creators of new technology may expect and the extent, speed and efficiency with which that technology is disseminated throughout the economy. The sale and licensing of technology are subject to antitrust principles, and it is the ability of the owners of technology to engage in such sale and licensing that determines the extent to which the benefits of the new technology will be developed and disseminated. Unfortunately, courts and commentators occasionally have described the antitrust and intellectual property laws as being at odds with one another. As a consequence, the courts have interpreted the antitrust laws in a way that unduly restricts the sale and licensing of technology.

This interpretation is unfortunate. Both the antitrust and intellectual property laws are designed to foster competition and to create the free-market incentives that have produced virtually everything we Americans enjoy today. So long as the sale or licensing of intellectual property does not unduly restrict competition, the freedom of its owners to choose the most efficient and effective means to develop new technologies should not be impeded.

After a review of the antitrust and intellectual property laws, the Administration has concluded that a small number of important improvements in those laws could greatly enhance their ability to foster technological growth. The National Productivity and Innovation Act of 1983 embodies these improvements. The Act contains four substantive titles. The improvements it makes to the antitrust laws relate to joint R&D and the licensing of intellectual property. The improvements it makes to the patent and copyright laws clarify and enhance patent and copyright protection and assure that process patent holders are protected against infringement by unauthorized foreign imports.

Title II of the Act concerns the application of the antitrust laws to joint R&D. Many types of R&D have become increasingly complex and sophisticated and therefore increasingly expensive. In some contexts, advances in technology in turn have increased the advantages of large-scale R&D efforts. And it is possible that in some markets no single firm is individually capable of performing a particular type of R&D. Cooperation therefore has become an important avenue for conducting R&D efficiently, and so for enhancing American productivity and competitiveness. Properly interpreted, the antitrust laws act only to prohibit anticompetitive joint R&D; they do not proscribe those ventures, no matter how large, that are necessary to the efficient performance of R&D.

There is a perception, however, that the antitrust laws discourage joint R&D efforts, regardless of their benefits. There is virtually no case law dealing directly with the relationship between the antitrust laws and joint R&D. There are, however, a few older decisions that can be read as condemning, more or less out-of-hand, non-R&D joint ventures between competitors. This and the fact that treble damages are automatic in antitrust cases have led to conservative antitrust advice and decision-making with respect to joint R&D. Firms fear that after investing large amounts of capital in a venture, they may be faced with the threat of a treble-damage suit by a disgruntled competitor who has been excluded from the venture. And, of course, the risk of such a suit increases in direct proportion to the economic success of a joint R&D venture.

Title II of the National Productivity and Innovation Act is the best approach to alleviating the antitrust risk faced by joint R&D ventures. That title first makes it absolutely clear that joint R&D ventures are not to be deemed illegal per se in actions under the antitrust laws. This would prohibit the courts from condemning joint R&D ventures without first considering their potential benefits. The fact that the courts must apply a "rule of reason" analysis to joint R&D does not mean, of course, that in every case the court must sift through and account for every idiosyncracy of the given arrangement and its surrounding circumstances. Rather, the courts should develop rules or presumptions based on economic learning and experience.

Although joint R&D ventures are usually procompetitive, such ventures can have two different anticompetitive effects. First, a joint R&D venture can serve as a device through which competitors can coordinate prices and output on current production in some market other than the R&D market. Traditional methods of antitrust analysis, with some modification, can detect this possibility, which will turn on factors that include concentration in the relevant market, the market share of the joint venture, the nature of research (applied or basic), and the extent to which information on current prices, cost and/or output is exchanged among the members.

Second, a joint R&D venture, if overinclusive, may have adverse effects on the incentives to innovate. Rivalry in R&D, like rivalry in the sale and purchase of goods and services, is important. A joint R&D venture can reduce the incentives to innovate if the joint venture includes too large a percentage of the market composed of all firms capable, individually or cooperatively, of undertaking the same or similar R&D. So long as there is a sufficient number of R&D competitors outside the venture to form a competitively significant number of other R&D projects of a similar capability--perhaps five--the joint R&D venture would, in all likelihood, have no adverse effect in the R&D market and should not violate the antitrust laws. Courts should not automatically condemn larger R&D ventures but should determine whether economies of scale or scope or other efficiencies justify their greater inclusiveness.

In analyzing the inclusiveness of an R&D venture, one must be realistic about the R&D market. It is safe to say that the R&D market will often (but not invariably) be international in scope. Technology that results from R&D conducted in another country can usually be licensed in the United States, even if products embodying the technology made in that country could not be sold competitively here because of import barriers or transportation costs.

Simply clarifying the antitrust rules that apply to joint R&D will not be sufficient to reduce the antitrust risks that currently may be inhibiting the formation of procompetitive joint ventures. Title II therefore goes further and also provides that participants in a joint R&D venture that has been fully disclosed to the Justice Department and the Federal Trade Commission would be liable for no more than any actual antitrust injury caused by the venture, plus interest from the date suit is filed. Joint venture participants could request confidential treatment of commercially-sensitive information included in their disclosure.

Title II contains no new regulatory scheme, no requirement for formal certification. Title II provides straightforward protection to all R&D aspects of a joint venture; any other activities of the joint venture would continue to be subject to current antitrust rules. And Title II preserves an adequate antitrust safeguard with respect to joint R&D itself; any anticompetitive activity could still be challenged. In short, Title II would eliminate the deterrent effect that legal uncertainty, combined with treble damages, may now be having on joint R&D, while preserving competitive incentives to search for new technology.

Most of the other legislative proposals in this area stop short with some equivalent of Title II. More must be done. Removing a perceived deterrent to joint R&D is certainly important, but we must also increase industry's basic incentive to commit resources to R&D. The National Productivity and Innovation Act does just that, and thus goes much further towards assuring a legal climate that is conducive to the creation, development, and commercial exploitation of new technology.

Title III of the National Productivity and Innovation Act encourages innovation by assuring that intellectual property licensing is treated reasonably under the antitrust laws and by eliminating the threat of treble damages based on such licensing. The antitrust laws must be sensitive to the procompetitive benefits that the licensing of intellectual property can achieve. Licensing and the ancillary restrictions frequently used in licensing enable intellectual property owners to employ the superior ability of other enterprises to develop and market technology more quickly and efficiently. For example, an intellectual property owner can use licensing restrictions to induce others to develop new technology in fields of use that the owner might otherwise be unable to exploit.

It is crucial that the courts carefully consider procompetitive benefits when evaluating the lawfulness of intellectual property licensing under the antitrust laws. While many courts appreciate the competitive benefits of intellectual property and its licensing, others seem to have viewed a system of exclusive rights that enables the inventor or innovator to enjoy the fruits of his labor as somehow inconsistent with the antitrust laws. Title III would alleviate the hostility occasionally shown toward intellectual property in the context of antitrust suits by expressly prohibiting the courts from condemning intellectual property licensing as illegal per se. Before a court could find that a particular agreement, or a particular restriction in an agreement, conveying rights to use intellectual property violates the antitrust laws, it would have to consider the agreement's procompetitive benefits.

Title III also provides that the licensing of intellectual property will not subject its owners to possible treble-damage liability. The threat of treble-damage liability is a strong deterrent to firms engaging in conduct that bears some risk of being held to violate the antitrust laws. Where the conduct is clearly anticompetitive, as in the case of price fixing among competitors, such deterrence is appropriate. However, where the conduct may very well be procompetitive, as is the case with intellectual property licensing, the availability of punitive damage remedies is unfair and counterproductive. Moreover, because licensees are generally the plaintiffs in antitrust suits challenging intellectual property licensing practices and because licensees obviously will be aware of potentially anticompetitive restrictions, the award of treble damages is not necessary to induce "private attorneys general" to root out anticompetitive licenses. Title III therefore provides that liability under the antitrust laws in cases based on the licensing of intellectual property will be limited to any actual antitrust injury caused by the challenged conduct, plus interest from the date suit is filed. The deterrent of treble damages would be eliminated, but adequate compensatory remedies would be preserved. In sum, Title III sends a clear message that intellectual property enhances rather than impedes innovation and productivity, and that antitrust enforcement must be appropriately sensitive to this fact.

Title IV of the National Productivity and Innovation Act also concerns the exploitation of intellectual property, but involves amendments to the patent and copyright laws rather than the antitrust laws. Courts occasionally have employed the judicially-created doctrines of patent and copyright misuse to justify a refusal to enforce a valid patent or copyright against infringement. The equitable doctrine of misuse was originally developed by the courts to deny legal protection to intellectual property until that property was purged of any taint that resulted from its use by the owner in an anticompetitive manner. The notion was that by using the property anticompetitively an intellectual property owner was able to extend his exclusive rights beyond what the law allowed and so was able to earn more from his property than that to which he was entitled under the law.

Over time the doctrine of misuse began to drift away from its original intent. Judges began to use the doctrine to refuse to enforce otherwise valid patents on the basis of vague notions of what seemed "unfair" to them. Conduct was deemed to be misuse without the rigorous economic analysis that should be employed under the antitrust laws to determine whether particular conduct is harmful. As a consequence, the courts have sometimes condemned beneficial conduct that maximizes the rewards to which patentees and copyright holders are legitimately entitled.

Title IV is designed to eliminate the divergence between the misuse doctrine and the sound economic analysis that identifies truly anticompetitive behavior. It does so by precluding courts from classifying conduct as patent or copyright misuse on competitive grounds unless such conduct violates the antitrust laws.

Title V of the National Productivity and Innovation Act closes a loophole in the U.S. patent laws that has impaired the ability of process patent holders to earn their rightful reward and so reduced incentives to create and develop new and more efficient ways to produce the goods society needs. In addition, this loophole has created a perverse incentive for U.S. firms to manufacture products outside this country using foreign labor.

Process patents are of particular importance to increasing the productivity of labor and the ability of our industries to compete in transnational markets. Process patents generally are granted for new uses of existing goods or for new ways to produce existing goods. They are particularly important in increasing the efficiency of industry and in enabling U.S. firms to manufacture products at minimum cost.

Under current law, the owner of a patent covering a process has significantly less protection against the unauthorized use of his invention than the owner of a patent covering a product. Where a product patent is involved, a firm cannot avoid infringement by manufacturing the product overseas and then importing it into the United States, because the use or sale of the product in the United States would infringe the U.S. product patent. Where a process patent is involved, however, there is often no effective means by which a patentee can prevent a firm from practicing the process patent overseas and then selling the product made by that process in the United States. Unlike the patent laws of most of our trading partners, U.S. patent law does not condemn this conduct as an infringement of the process patent. This loophole not only discourages firms from investing in R&D aimed at discovering new and better processes, but it also encourages firms to manufacture overseas with foreign labor when a U.S. process patent is involved.

Title V is directed at eliminating both of these undesired effects by classifying the use or sale in the United States of a product made by a process covered by a U.S. patent as an infringement of the process patent, regardless of where in the world the patent is practiced.

Taken as a whole, the reforms contained in the National Productivity and Innovation Act will significantly improve the legal climate for R&D. The Act will eliminate a perceived deterrent to R&D and increase industry's incentive to invest in these crucial efforts.

The National Productivity and Innovation Act is the best of the currently pending legislation that is designed to improve the legal climate for private sector R&D. Basically, the bill has two substantial advantages over the competing bills. First and foremost, the National Productivity and Innovation Act does much more to enable the private sector to create, develop and market new technologies. Unlike the other bills that only deal with the issue of joint R&D, the Act goes much further to increase the incentives throughout the economy to engage in all types of R&D.

In fact, I believe the reforms that remove the restraints on intellectual property licensing and that increase the protection for process patents will have a more profound and positive effect on private sector R&D. A focus on joint R&D is far too narrow. While in some industries collaborative R&D may be important to enable the participants to expand the frontiers of technology, in most industries firms perform R&D alone. Yet it is essential that there be adequate incentives for R&D of all types.

Moreover, R&D is worth very little to society if it cannot be translated into better, cheaper goods and services. The National Productivity and Innovation Act provides benefits economy-wide by dealing with the incentives for all types of R&D and by improving the ability of the owners of technology efficiently to develop and fully to disseminate their technology after it is created.

In addition, the inhibiting effect that the antitrust laws and the misuse doctrines currently have on procompetitive licensing hits small businesses particularly hard. Small businesses and individuals are the source of countless inventions and innovations that promise to benefit society. Unlike their large corporate counterparts, however, small firms are often unable fully to exploit technologies by themselves; they must license. Overly restrictive application of the antitrust laws imposes additional costs on such businesses and may put them at an unnecessary competitive disadvantage with respect to their larger competitors.

In addition, small businesses often may be in the best position to develop particular applications of a new technology. It is likely, however, that some of those businesses are deprived of access to technology because of the antitrust risks that may deter the technology's owner from licensing. Small businesses therefore are likely to be the recipients of many of the licensing opportunities that will be created by S. 1841.

Second, the approach that the National Productivity and Innovation Act takes specifically with respect to joint R&D is superior to the approach of most of the other bills. Some of the other proposals seek to alleviate the deterrent effect of the antitrust laws on joint R&D ventures by requiring government certification, which is tantamount to regulation, of all joint R&D ventures. Such certification would require some government agency--most likely the Department of Justice--to expend a great deal of resources investigating joint ventures that otherwise would never have raised a concern. It would unnecessarily increase the cost of forming and operating joint R&D ventures. Moreover, to some extent, a certification requirement would make the government an unwilling and uninvited partner in all joint R&D.

A number of bills are inferior because they would grant antitrust immunity to joint R&D ventures that comply with certain standards, which tend to be wooden and arbitrary. None of the standards that have been proposed would be as effective as the current antitrust standard in distinguishing procompetitive ventures from anticompetitive ones. In fact, many of the proposed substitute standards could encourage anticompetitive joint R&D ventures and could inhibit many desirable ones.

The support for new standards or for a statutory safe-harbor generally reflects industry's desire for greater certainty in deciding whether and how to form joint R&D ventures. The Department of Justice shares that desire. At the same time, however, we believe that it will be extremely difficult to draft statutory standards or a safe-harbor that is sufficiently flexible. The standards should allow joint R&D ventures to adopt the most efficient structure and should also proscribe anticompetitive conduct in the myriad of circumstances which conceivably might surround a joint venture. While I seriously doubt that statutory language can be drafted to provide such standards, the Committee's Report could provide a great deal more certainty by explaining in detail the antitrust standard to be applied to joint R&D.

The most egregious standards I have seen provide competitors who otherwise would not be invited to participate in a joint venture with mandatory access to all joint R&D ventures and/or to the technology they create. Such mandatory access or licensing would reduce the incentive to engage in R&D in the first place. Without the reward that exclusive property rights enable intellectual property owners to earn, it is likely that the private sector would invest far less in R&D than it currently does.

The supporters of compulsory licensing generally speak in idealistic terms of the need to disseminate technology. They also contend that requiring compulsory licensing after but a few years will not harm the incentives to invest in R&D. This argument is given an aura of credibility by the fact that the most vocal advocates also ardently support the concept of antitrust immunity for joint R&D. However, those supporters are in industries where technology is generally obsolete within a few years and where it has not been necessary to rely on the 17-year grant of exclusivity provided by the patent system. In most industries the elimination of many years of exclusivity would be disastrous. And R&D legislation should not discriminate against practically all U.S. industries in order to provide a special immunity for a few.

The rationale for compulsory licensing is to assure that technology will be fully disseminated throughout the economy and that small businesses will have access to technology. However, it is not difficult to understand that to the extent such dissemination erodes or destroys the incentive to invest in R&D in the first place, there eventually will be little, if any, technology to disseminate. It makes far better sense to encourage dissemination of technology in a way that does not harm the incentives for R&D. The third and fourth titles of the National Productivity and Innovation Act do precisely that. Not only will those reforms increase the willingness and ability of intellectual property owners to disseminate technologies, but the reforms also will increase the incentive to invest in R&D.

The Administration is anxious to work with this Committee and with the Congress toward the prompt enactment of this timely and important legislation.

Mr. Chairman, that concludes my prepared statement. I will be happy to address any questions you or the other members of the Committee may have.

The CHAIRMAN. Our next two witnesses are Hon. Gerald J. Mossinghoff, Assistant Secretary of Commerce and Commissioner of Patents and Trademarks, Office of Patents and Trademarks, Department of Commerce, and Hon. Dorothy Schrader, Associate Register of Copyrights for Legal Affairs, Library of Congress.

I have 15 minutes now to hear from four witnesses. Without objection, your entire statements will go in the record. Could you just take about 3 minutes apiece and summarize for us, and then we may have some questions we would like you to answer.

Is that agreeable with you?

Commissioner MOSSINGHOFF. That will be fine, Mr. Chairman.

The CHAIRMAN. Thank you. You may proceed, Mr. Mossinghoff.

STATEMENT OF HON. GERALD J. MOSSINGHOFF, ASSISTANT SECRETARY OF COMMERCE AND COMMISSIONER OF PATENTS AND TRADEMARKS, OFFICE OF PATENTS AND TRADEMARKS, DEPARTMENT OF COMMERCE, WASHINGTON, D.C.

Commissioner MOSSINGHOFF. Thank you, Mr. Chairman.

Mr. Chairman, I will not elaborate on the statements made by Secretary Baldrige and Assistant Attorney General Baxter except to say that the Patent and Trademark Office fully agrees with those positions, and particularly with the positions taken by Mr. Baxter on the importance of intellectual property protection to stimulating the advances that this country needs to compete worldwide in highly competitive markets.

I will address simply title V of the bill very briefly. That title would make a significant improvement in the patent law as it affects the owners of process patents. This type of patent has become increasingly important in high technology areas.

Under existing law, the patent is infringed only if the patented invention is made, used or sold in the United States, and that is not the case with a process used abroad. Title V of the bill would complement section 337(a) of the Tariff Act by amending the patent laws to make the use or sale in the United States of a product produced abroad by a patented process an infringement, subject to the full remedies provided by the patent laws.

This change in the law, Mr. Chairman, would bring the United States in line with all of our major trading partners. Virtually all of the countries that we compete with and trade with have seen the wisdom of this provision.

We think this provision is virtually without opposition and we urge that title V of the bill be favorably considered by your committee.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much. We may submit some questions to you and you can answer those for the record.

Commissioner MOSSINGHOFF. Yes, sir.

[The prepared statement of Commissioner Mossinghoff follows:]

PREPARED STATEMENT OF GERALD J. MOSSINGHOFF

Mr. Chairman and Members of the Committee:

I welcome this opportunity to testify on the "National Productivity and Innovation Act of 1983." Secretary Baldrige has already addressed the subject of joint R&D ventures, and I would like to comment on the remaining portions of the bill dealing with intellectual property.

The importance of protecting intellectual property to foster both domestic and international trade cannot be overstated. Businesses of all nations now operate in an increasingly competitive, worldwide marketplace. Strong protection of patents, trademarks, and copyrights is vital to the success of U.S. business in that arena. In the past, our nation's greatest competitive advantages were the ideas that helped America grow. Now, more than ever, we need to encourage and protect those ideas.

To compete successfully both here and abroad, U.S. industry must innovate. This process frequently entails great costs, not only for research and development but also for the subsequent investments necessary to manufacture and market new products. The incentive for, and the security of, these investments are provided by an effective system of protection for intellectual property. Strong patent protection, along with industry's ability to make effective use of patents to safeguard domestic markets, to increase exports, and to expand licensing opportunities both here and abroad, are essential to our trade expansion in today's highly competitive environment.

The ability to license proprietary technology is an important component of an effective patent system. Licensing can result in products getting to the marketplace more quickly or at lower cost than might otherwise be possible if only the patentee's own resources are relied upon. Licensing can therefore be important in allowing domestic patent owners to compete more effectively with foreign and domestic firms that sell competing goods. The same procompetitive benefits that flow from encouraging the licensing of patents also result from facilitating the licensing of other forms of intellectual property, such as copyrights, trademarks, and trade secrets.

Despite the efficiencies resulting from the licensing of intellectual property, courts have sometimes condemned licensing practices under the antitrust laws without sufficient sensitivity to their basic procompetitive nature and purpose. In evaluating the conduct of patentees under the antitrust laws, some courts have characterized the patent system as being inherently in conflict with antitrust goals. This philosophy, however, is inconsistent with the actual workings of the marketplace where the patent owner's exclusive rights encourage competition between and among different technologies. Moreover, the judicial approach has discouraged licensing that would permit intellectual property owners to compete effectively. Rather than being inherently at odds with a competitive economic system, the protection of intellectual property is an important part of that system.

Title III of S. 1841 would amend the Clayton Act to provide that courts may not treat intellectual property license arrangements as per se illegal under the antitrust laws. The present per se approach is very damaging to the innovation process, as courts may condemn licensing conduct without any consideration of its economic justifications or its actual economic effects. By removing the cloud of per se condemnation from intellectual property licensing practices, the ability of technology owners to exploit their rights in the most efficient way would no longer be undermined. The courts would thereafter assess the lawfulness of these arrangements under the antitrust laws by analysing licensing conduct through the use of a rule of reason. Such an analysis would weigh the efficiencies and other procompetitive benefits involved in a particular licensing arrangement against any argued anticompetitive effects.

This is not to say that anticompetitive behavior would be found lawful under the antitrust laws. Such conduct will remain illegal, and courts should arrive at a finding of unlawfulness using a rule of reason analysis. Removing the judicial per se approach merely obliges the courts to hear evidence on the actual economic effects of the licensing arrangement. This legislation would therefore encourage innovation by assuring inventors that licensing practices cannot be declared unlawful under the antitrust laws without consideration of their procompetitive effects.

Title III of the bill would also eliminate the recovery of treble damages required under present law in actions involving intellectual property licenses for antitrust violations. Instead, actual damages would be awarded and the court would be authorized to award prejudgment interest and costs, including reasonable attorneys fees.

As I stated, the judicial approach to patent licensing has discouraged patent owners from licensing. However, it is recognized that licensing can enable patent owners to compete more efficiently. Therefore, licensing should be encouraged to the maximum extent possible without encouraging anticompetitive behavior. Awarding actual damages, prejudgment interest, and costs will remove a disincentive to licensing while at the same time providing liability for anticompetitive behavior and an adequate remedy to those who are injured as a result of anticompetitive behavior.

Prejudgment interest, for which this bill provides, is the interest on damages awarded a successful plaintiff that would accrue before entry of the judgment -- normally, the period from the date on which the litigation was commenced to the date on which judgment was entered. The award of prejudgment interest is necessary to provide full compensation to a victim of an antitrust violation for his loss in any case in which damages are not to be trebled.

Prejudgment interest is now available to a very limited extent in antitrust cases under conditions which generally take no account of the needs to assure that plaintiffs are fully compensated for their injuries, but instead require demonstrations of bad faith, dilatory behavior, or delaying tactics by the defendant. The Supreme Court has recently clarified the prospect of obtaining prejudgment interest in patent infringement cases, and there is no reason why this remedy should not also be available to make a plaintiff whole in antitrust cases. Of course, since a plaintiff's damage theory and conduct during litigation can influence the amount of prejudgment interest to be awarded, courts should be empowered to adjust such awards if circumstances indicate that normal assumptions as to the need for compensatory prejudgment interest would lead to unjust results.

Title IV of the bill would carefully limit the misuse doctrine involving patents and copyrights, but not eliminate it. Misuse violations often resemble antitrust violations. While the antitrust statutes were enacted to prevent anticompetitive behavior, the law of misuse was judicially created to prevent patent and copyright owners from inequitably extending their rights. In circumstances where a patentee's behavior is said to be a "misuse" of the patent right, courts have refused to enforce the inventor's exclusive rights thereby destroying the value of the patent. The judicial holdings of misuse have been based on the assumption that certain practices are necessarily anticompetitive and beyond the rights afforded patentees by the patent system. These determinations were made by inquiring into the equitable aspects of the practices rather than their competitive effects. As a consequence, some existing patent misuse precedent is unsound because it condemns certain conduct as economically contrary to public policy without going through the analysis necessary to determine whether such conduct is in fact anticompetitive.

Title IV has identified six practices which, if engaged in today by the owner of a patent or copyright, place his entitlement to relief for infringement in doubt. This legislation would remove this disincentive to procompetitive licensing practices by bringing the patent misuse doctrine within appropriate boundaries. Under this legislation, patent and copyright owners could obtain relief for infringement unless their conduct, in view of the surrounding circumstances, violated the antitrust laws.

Patent licensing practices that have only alleged anticompetitive effects should not be condemned out of hand. Such practices should be scrutinized in the circumstances in which they occur, in full recognition of the exclusive rights granted to patentees under the law, in order to determine whether such practices are substantially likely to reduce competition. Only after such a finding should a patentee be held to have misused his patent. This legislation would require courts to use sound economic analysis before condemning, on competitive grounds, patent licensing practices previously classified as misuse. As a consequence, patentees would have greater flexibility in realizing the full benefits of their patents, thereby further encouraging firms to invest in research and development aimed at discovery of new products and new processes.

The copyright laws would be amended in a similar manner. The doctrine of misuse has been developing in copyright infringement actions, although not nearly as extensively as in the patent area. Amendment of the patent laws to address the misuse problem should be accompanied by corresponding amendment of the copyright laws.

Finally, Title V of the bill would make a significant improvement in the patent law as it affects the owners of process patents. This type of patent has become increasingly important in high technology areas. For example, insulin is a naturally occurring compound, and as such is unpatentable. However, new methods for synthesizing insulin are subject to patent protection and are extremely valuable commercially.

Under existing law, the patent is infringed only if the patented invention is made, used, or sold in the United States. Where a product patent is involved, someone cannot avoid infringement by manufacturing the product overseas and then importing it into this country, because the use or sale of the product in the United States would infringe the patent. A process patent, on the other hand, may only protect a process or method of making an article. Unlike the laws of our major trading partners, the holder of a U.S. patent cannot, under our law, prevent someone from practicing the process patent abroad and then selling the resulting product in the United States. Technically, no one has made, used, or sold the patented process in this country.

A patentee has two options to protect his patented process. He might seek to obtain patents in as many other countries as possible and then sue for infringement in foreign courts when the process is practiced in those countries. This option is unrealistically expensive and largely ineffective because of the impossibility of obtaining adequate protection in all of the countries in which the process might be used.

The other available remedy is to seek relief from the International Trade Commission for violation of Section 337a of the Tariff Act of 1930, as amended. The patentee can seek a cease and desist order against a particular firm, or an exclusion order that would bar the importation of products made by the patented process, if the Commission finds a violation of the statute. This remedy, however, is not always adequate. First, the Commission cannot award damages to a patentee. In addition, to obtain a cease and desist or an exclusion order, the patentee must show that the imported product was made by the patented process and in addition, that the effect of such importation is to destroy or substantially injure a U.S. industry, or constitute a restraint on U.S. trade and commerce.

Further, cease and desist orders against particular firms may not be effective where importation of offending products can easily find alternative channels. And enforcement of exclusion orders by customs officials can be difficult because of the problem of differentiating products made by the patented process from those that were not so produced.

Title V of this bill would complement Section 337a of the Tariff Act by amending the patent laws to make the use or sale of a product produced by a patented process an infringement, subject to the full remedies provided by the patent laws. It would also establish a presumption that a product which could have been made by a patented process was actually made by that process. This provision may be of particular benefit to the owner of the U.S. process patent seeking remedy against the importer of a product made by that process in a foreign country, since the laws of some countries do not provide the discovery procedures available through U.S. courts. This frequently makes it very difficult for a U.S. patent holder to secure proof of actions taken in a foreign country. Shifting the presumption should create no substantial burden, since an alleged infringer is in a much better position to establish that the product was made by another method.

Protection for alleged infringers is provided by requiring the patentee first to show a reasonable likelihood that an allegedly infringing product, which could have been made by the patented process, was in fact so produced. The patentee would also be required to make a reasonable effort to determine how the product was actually made and that he was unable to make that determination. Thus, patentees must make initial, good faith efforts to prove this key element in their infringement cases. They would have to use normal discovery channels and other good faith methods, as courts deem appropriate. Placing this burden on patentees should help eliminate frivolous suits.

Importation and sale in the United States of products produced by processes patented in this country severely undercut the value of such patents. As a consequence, this practice must be effectively countered by changes in the patent laws to protect the legitimate interests of U.S. inventors. Expanding the scope of the U.S. patent laws in this fashion would bring them into conformity with the European Patent Convention and with the national laws of many other industrialized countries.

In conclusion, the amendments regarding intellectual property rights provided in S. 1841 would go a long way to enhance the protection needed for those rights. Innovation has become increasingly central to the U.S. economy, and industry must be given the tools to compete effectively both domestically and abroad. In this context, I would like to echo the words of the President who said in his message to the Congress transmitting the proposed legislation:

"While the economy generally benefits most from vigorous competition among independent businesses, the antitrust laws recognize that in some areas, like the creation and development of technology, cooperation among producers, even competitors, can actually serve to maximize the well-being of consumers. The intellectual property laws, for example those dealing with patents and copyrights, also serve to promote the interests of consumers. The promise of the financial reward provided by exclusive rights to intellectual property induces individuals to compete to create and develop new and useful technologies .... We must not delay making the necessary changes in the law to encourage the creation and development of new technology, to increase this country's productivity, and to enable our industries to compete more effectively in international markets. We must act now ...."

The **Chairman**. Ms. Schrader, we are glad to have you with us, and if you would take about three minutes and summarize your position, and without objection, your entire statement will go in the record, and then if you will answer some questions we will submit to you for the record.

STATEMENT OF HON. DOROTHY SCHRADER, ASSOCIATE REGISTER OF COPYRIGHTS FOR LEGAL AFFAIRS, LIBRARY OF CONGRESS, WASHINGTON, D.C., ACCOMPANIED BY PATRICE LYONS, SENIOR ATTORNEY-ADVISOR

Ms. **Schrader**. Yes, thank you very much, Mr. Chairman. I will do that. I would note for the record that I am accompanied by Patrice Lyons, senior attorney-adviser in the Copyright Office.

The Copyright Office does welcome this opportunity to reexamine the antitrust law and its relationship to copyright licensing, and we are generally supportive of the provisions of the law that affect copyrights. We, of course, have no comments and no views on provisions other than those that do affect copyright.

We have noted that the new technological developments, especially those such as the photocopying machine, the video cassette recorder, cable television, and telecommunications satellites have made it possible for copyrighted works to be disseminated on a far wider basis than previously, but this has also made it more difficult for copyright owners to detect infringement and for copyright owners to license their works on an individual basis.

And so, one of the hopes that the Copyright Office would have is that S. 1841 will make it easier to engage in collective administration of rights under the copyright law and resolve some of these infringement, detection, and control problems that we see developing, especially in areas such as photocopying, perhaps the licensing of home recorders if the pending bill, S. 31, is passed and in the case of the performance of music.

We note especially that the provision concerning application of a rule of reason to copyright licensing activities to determine whether there has been a violation of the antitrust law, would seem to be beneficial. Some cases involving copyrights have already held that a rule of reason analysis should be used, but we are not sure that the trend is general enough. We would hope that this will assist the courts in applying the law in this way. Similarly, we think it would be beneficial to have remission of the treble damages provision and have actual damages as the remedy, if there is a violation.

In the case of misuse of copyright, we do note that in the past this has not appeared to be a problem in the copyright law as it has in the case of patents, but there have been a few references in copyright infringement actions suggesting that a court might be willing to countenance this defense. We believe that the bill's proposal regarding misuse of copyright is a useful clarification of the law. The committee might, however, wish to note in the report that there is this distinction between copyright and patent and that the misuse defense was rather well established apparently in the case of patents, but had not been established in the case of copyrights.

Basically, we are hopeful that the copyright provisions of S. 1841 will lead to a more flexible application of the antitrust law and widen the potentialities for collective administration of rights in the future for the benefit of copyright owners and for the benefit of users of copyrighted works.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Ms. Schrader.

We appreciate the presence of both of you, and I assure you your testimony will be given careful consideration.

Thank you very much.

[The prepared statement of Ms. Schrader follows:]

PREPARED STATEMENT OF DOROTHY SCHRADER

I am Dorothy Schrader, Associate Register of Copyrights for Legal Affairs and General Counsel of the Copyright Office. It is my privilege to appear before you today to present the views of the Copyright Office regarding S. 1841, the "National Productivity and Innovation Act of 1983," which, among other purposes, would amend the Copyright Act[1] to modify the impact of antitrust law on licensing of copyrighted works.

The Copyright Office welcomes this opportunity to re-examine antitrust law and its relationship to copyright licensing. The Office is generally supportive of the purposes of the legislation, as it affects copyright law. I will confine my remarks to the bill's copyright aspects. The Copyright Office does not have any expertise in the general field of antitrust law, but we have some knowledge of, and views about, its application to the copyright law — both now and in consideration of future trends.

New technological developments -- the photocopying machine, the videocassette recorder, cable television and telecommunications satellites, for example, — have not only made copyrighted works publicly available on a pervasive basis, but also in ways that make infringements difficult to detect or control by the efforts of individual copyright owners. In commenting on S. 1841, I will discuss collective administration of rights as a possible solution to some of these "infringement detection and control" problems, and illustrate the antitrust law complications by discussing collective licensing of music performing rights, and of photocopying of journals and books.

I. COPYRIGHT PROVISIONS IN S. 1841

Per se exemption

Sec. 301 of S. 1841 would amend the Clayton Act, as amended (15 U.S.C. 12 *et seq.*), by adding a new section, subsection (a) of which, would prohibit agreements conveying "rights to use, practice, or sublicense . . . copyrights"[2] from being deemed illegal per se in actions under the antitrust laws. Copyright licensing agreements would remain subject to scrutiny under a rule-of-reason inquiry.

Although it is difficult to project the application of this proposal in all possible situations, the change would appear salutary. The exercise of the rights accorded owners of copyright under the 1976 Act has become more difficult with the increased availability of new technical means of dissemination. Although computers, videorecorders, photocopy machines, satellites and other technological developments create new markets for copyrighted works, and certainly make the knowledge contained therein more widely available, the discovery or control of copyright infringements has become increasingly complex. In view of the essentially private character of many new uses of protected works, it may not be practical to try to impose charges for such uses on a transactional basis. Author's societies, copyright proprietors, and a growing body of non-commercial users of copyrighted works now see the necessity of devising indirect methods of monitoring such uses, charging for them, and distributing the monies collected to the copyright owners whose works are used.

The negotiation of voluntary collective agreements for the administration of copyrights would be facilitated by the proposed amendments to the Clayton Act and the Copyright Act set forth in S. 1841. They would relieve parties seeking such arrangements from the specter that their efforts might be defeated as a per se violation of the antitrust laws, while still potentially subjecting them to a more discriminating examination under the rule of reason.[3]

Actual damages

The proposal in S. 1841 to limit recovery to actual damages in antitrust actions involving specific copyright agreements, is linked to the amendment concerning the per se rule. Again, this measure would encourage the development of collective schemes for the administration of copyright royalties, without completely freeing such agreements from possible challenge on antitrust grounds. This balancing of incentives to develop needed mechanisms to meet the obstacles encountered in connection with the new technologies, coupled with the continued application of the antitrust laws in general, is a worthwhile advance that the Copyright Office supports.

Copyright misuse

Since the early part of the twentieth century when the courts refused to grant relief to a plaintiff who was deemed to have "unclean hands",4/ through the more recent discussion of the possible defense of "copyright misuse",5/ there has been reluctance on the part of many courts to rely on such equitable considerations in reaching a decision in an action for copyright infringement. There has been an even greater resistance to allowing an antitrust defense to defeat a copyright claim.6/

S. 1841 would amend subsection (a) of section 501 of title 17 U.S.C. to provide that unless certain conduct violates the antitrust laws, the courts shall not refuse to enforce the copyright on the ground of misuse or illegal extension of copyright. Again, the courts would be required to engage in a rule-of-reason analysis to determine whether the particular conduct is in fact anticompetitive. The amendment would not appear to alter the present development of the copyright law in this area to any great extent.7/ Since copyright misuse is infrequently invoked in copyright infringement cases,8/ and is rarely successful,9/ there would not appear to be substantial adverse impact from the proposed modification of the defense. It is important to note that the conduct in question would remain subject to challenge under the antitrust laws.

Joint research and development

Sec. 203 of S. 1841 provides that, notwithstanding Sections 4 and 4C of the Clayton Act (15 U.S.C. 15 and 15c) recovery against persons engaging in joint research and development following notification to the Attorney General, will be limited to actual (rather than treble) damages, or to the "total damage" in the case of a State harmed by the anticompetitive conduct, plus interest, costs, and attorney's fees.

The proposal potentially affects licensing of copyrighted works such as computer programs, which may be created under a joint research and development program. Relatively few copyrighted works are likely to be affected.[10]

II. COLLECTIVE ADMINISTRATION OF RIGHTS UNDER COPYRIGHT

Substitution of a rule-of-reason for a per se analysis to determine antitrust violations in copyright licensing programs, and substitution of actual damages for treble danges, should have a positive affect on the ability of copyright owners collectively to license and enforce their copyrights.

Until recently, collective enforcement of copyrights existed primarily in the field of performance of music, which occurs nationally and world-wide on a broad scale. In 1914, the first performing right society was founded in the U.S. under the leadership of composer Victor Herbert and his attorney, Nathan Burkan. The new society, the American Society of Composers, Authors, and Publishers (ASCAP), licensed the performance of music on a nonexclusive basis. It won a landmark victory in the Supreme Court in 1917,[11] and has been followed by additional performing right societies -- Broadcast Music, Inc. and SESAC, Inc. Since the 1930's, however, one or more of these societies have been confronted with major antitrust litigation. ASCAP, for example, operates under a continuing consent decree under the supervision of the District Court for the Southern District of New York.

In 1979, the Supreme Court held[12] that the "blanket" performing right licenses offered by ASCAP and BMI are not per se violations of the antitrust laws. The Court found that the blanket license resulted in "substantial lowering of costs, which is of course potentially beneficial to both sellers and buyers. . . ."[13] It concluded that the "blanket license has certain unique characteristics: It allows the licensee immediate use of covered compositions, without the delay of prior individual negotiations, and great flexibility in the choice of musical material."[14]

After winning this major antitrust case, the performing right societies find themselves back in court as losers at the district court level in Buffalo Broadcasting Co. v. ASCAP, et al., 546 F. Supp. 274

(S.D.N.Y. 1982) (blanket licensing of music to be performed on local television stations constitutes unreasonable restraint of trade). This steady stream of antitrust litigation probably constitutes the most significant factor inhibiting further development of the collective administration of copyrights.

Antitrust considerations have also compounded the difficulties of achieving a solution to the photocopying problem in copyright law.

In his January 1983 Report to Congress on Library Reproduction of Copyrighted Works, the Register noted the widespread proliferation of copying machines (the number of copying machines in libraries increased by one-third between 1976 and 1980) 15/ and the clear violations of the law (multiple reproduction of copies16/ and copying for job-related purposes,17/ not excused by the relevant law). The Copyright Office in this report endorsed the principle of a publisher proposal known as the "umbrella statute," whose purpose is to encourage voluntary participation, by publishers and users, in collective licensing arrangements. One of the Register's principal recommendations to Congress was to encourage the parties affected by library reproduction of copyrighted works to participate in existing collective licensing arrangements and to develop new ones.

The Copyright Clearance Center (hereafter CCC) has existed since 1977 for the blanket licensing of periodicals and certain books (primarily in the field of scientific, scholarly, technical, publications). It was developed by an ad hoc committee of authors, publishers librarians, and other users in response to the expressed wish of Congress that such a service be created. It operates a centralized photocopy authorizations and payments system on behalf of member copyright owners. Member publishers grant libraries and other user-members advance permission to copy CCC-registered titles. The users pay copyright royalties based on prices fixed individually by publishers for copying particular items. The CCC then distributes the royalties to publisher-members, after deducting administrative costs.

The CCC has not been an immediate success. It has been hampered by too few members (both publishers and users) and too few titles registered. Corporate librarians, especially, complain that too few publishers and titles are registered to permit copying of a large number of works; publishers argue that too few libraries are members to make publisher participation worthwhile. Hanging over the whole system is the antitrust law. Publishers have -- with reason -- felt compelled to fix copying charges individually. They have tended to fix the charges at a high enough rate to compensate for the unpaid copying that occurs outside the CCC licensing system. Even with the aid of modern computers, the bookkeeping, reporting, and remittances required by the system have also been a negative factor.

Within the last few months, the CCC has formally announced a blanket licensing program, based on sampling techniques rather than copying transactions. Under this so-called "annualization scheme," the CCC will license a comprehensive listing of printed works for a blanket license fee, which is determined by negotiations, and use "metered" by statistical sampling. The blanket license would relieve users of most of the recordkeeping and reporting burdens of a transactional system. Copying would be reported only during a sampling period. On the basis of the sampling audit, the CCC would make an annual use projection for each registered publication and multiply these projections by the per-copy authorization fees established individually by publishers, to determine the licensing fee. Royalties will be distributed to copyright owners in direct proportion to the copying of each publication and its established fee. Allowances for non-chargeable copying (public domain material and fair use copying) will be factored into the contract.

I have described the CCC in some detail because this system for collective licensing attempts to respond to an express wish of Congress, constitutes one of the most innovative approaches to solving a copyright issue, and is arguably inhibited from full development by antitrust laws. Copying rates will continue to be set by individual publishers because price-fixing violates current antitrust law. How does a firm restraint on price-fixing inhibit collective licensing? It does so because high prices tend to be set to compensate for illegal copying, and high prices tend to discourage user compliance. Illegal photocopying behavior is so difficult to detect, that high copying prices increase illegal behavior with little user fear of a day of reckoning in court. And yet, publishers can only with great difficulty, if at all, set low rates on an individual basis.

The Copyright Office, in discussing the CCC, does not mean to be endorsing the commercial success of this particular collective system. The Office does approve of private collective licensing societies, especially in lieu of the common alternative: government regulation under compulsory licensing.

While it is difficult to project the impact of modifications of antitrust law, the Office is hopeful that the copyright provisions of S. 1841 will result in a more flexible application of antitrust law to licensing activities, and widen the potentialities for successful collective administration of rights in the future, for the benefit of owners and users of copyrighted works. After reviewing this statement, the Committee may also wish to consider other amendments to antitrust law to facilitate collective administration of copyrights. The subject could also be explored in greater depth by the Subcommittee on Patents, Copyrights, and Trademarks perhaps as part of possible hearings on library photocopying.

Thank you, I will be pleased to respond to any questions you may have.

ENDNOTES

1. Copyright Act of 1976, as amended, title 17 of the United States Code, §§ 101 et. seq. (1982).

2. Proposed new section 27(a) refers to the "use, practice, or sublicense" of copyrights. It may be suggested that, in light of the rights granted under section 106 of the 1976 Act, the terminology used in that section would be more appropriate. Reference is not usually made to the "use or practice" of copyright rights. These are patent terms. The Copyright Act does not grant an exclusive right to "use" the copyrighted work.

3. See Broadcast Music, Inc. v. CBS, 441 U.S. 1, 24 (1979).

4. See Edward Thompson Co. v. American Law Book Co., 122 F. 922, 926 (2d Cir. 1903); see also Stone & McCarrick Inc. v. Dugan Piano Co., 220 F. 837, 841 (5th Cir. 1915).

5. See e.g., M. Witmark & Sons v. Jensen, 80 F. Supp. 843, 850 (D. Minn. 1948), appeal dismissed sub nom, M. Witmark & Sons v. Berger Amusement Co., 177 F. 2d 515 (8th Cir. 1949); Alfred Bell & Co. v. Catalda Fine

Arts, 191 F. 2d 99, 106 (2d Cir. 1951); Broadcast Music, Inc. v. Moor-Law, Inc., 527 F. Supp. 758, 772 (D. Del. 1981.

6. See Harms, Inc. v. Sansom House Enterprises, Inc., 162 F. Supp. 129, 135 (E.D. Pa. 1958); and Peter Pan Fabrics, Inc. v. Candy Frocks, Inc., 187 F. Supp. 334, 336 (S.D.N.Y. 1960).

7. Subsection (2) of the proposed amendment to section 501 of title 17 U.S.C. uses the phrase "sale of the copyrighted work". In light of the wording of sections 109 and 117 of title 17, it may be asked whether the intent is to cover the material object in which a protected work is embodied, or the work itself. Some clarifying language would be helpful.

8. Patent misuse has apparently been a viable defense for many years. Morton Salt Co. v. Suppiger Co., 314 U.S. 488 (1941).

9. KINTNER & LAHR, An Intellectual Property Law Primer, pp. 450-452 (2nd ed. 1982).

10. If a copyright is granted by legislation in "mask works" used to make semiconductor chips, a larger number of copyrighted works could be affected by this provision. A pending bill, S. 1201, would so provide.

11. Herbert v. Shanley, 242 U.S. 591 (1917) (Public performance of music for the entertainment of restaurant patrons constitutes copyright infringement even though no direct charge is made for the performance).

12. Broadcast Music, Inc., et al. v. Columbia Broadcasting System, Inc., et al., 441 U.S. 1.

13. 441 U.S. at 21.

14. 441 U.S. at 22.

15. Report of the Register of Copyrights on Library Reproduction of Copyrighted Works (17 U.S.C. 108), p. 191 (Wash. D.C., January 1983).

16. Id., p. 215.

17. Id., p. 2.

The **CHAIRMAN**. Our next two witnesses are Hon. William A. Niskanen, member of the Council of Economic Advisers, and Hon. Charles Herz, general counsel, National Science Foundation.

Mr. **HERZ**. I am Charles Herz. I do not know where Dr. Niskanen is.

The **CHAIRMAN**. Well, we will just admit his full statement for the record when he comes.

You may proceed. If you can, please take about 5 minutes. Without objection, your entire statement will be admitted. We will also submit questions to you to answer for the record.

STATEMENT OF HON. CHARLES HERZ, GENERAL COUNSEL, NATIONAL SCIENCE FOUNDATION, WASHINGTON, D.C.

Mr. **HERZ**. Certainly, Senator, I will be glad to.

I would like to say that I am here today for Dr. Edward Knapp, the Director of the National Science Foundation, who regrets that a scheduled engagement with the Science Ministers of Europe prevented him from coming himself.

Senator, our concern is with the health and vitality of the country's science and technology enterprise, and we think that the relatively minor changes in the antitrust and intellectual property law you have heard described could materially strengthen that enterprise and bolster the competitive position of U.S. industry by encouraging useful industrial collaboration in R&D.

What we think is primarily needed at this time is just a signal to the lawyers and businessmen who have to decide about R&D joint ventures that the Government does not consider those R&D joint ventures in the same breath with other kinds of corporate collaboration that their counsel have been telling them to be worried about.

The law has been changing in this area. There is not a lot of evidence that R&D joint ventures have been attacked either by the Government or by private plaintiffs. Thus, we think all that is really needed is such a signal. We would particularly endorse the view of Mr. Baxter that either precertification by the Justice Department or these rigid and inflexible requirements that some of the bills contain would not help as much as they would be likely to hinder the development of R&D joint ventures.

We also recognize that the intellectual property provisions in title III, IV, and V of the administration bill are not in some of the other bills the committee will be considering. They are rather technical changes. I think they should be noncontroversial, and we very much hope the committee will include them in any legislation that it reports.

Thank you, Senator.

The **CHAIRMAN**. Thank you very much. Mr. Cannon will get some questions out to you.

Mr. **HERZ**. Very fine, sir.

[The prepared statement of Mr. Herz follows:]

PREPARED STATEMENT OF CHARLES H. HERZ

Mr. Chairman and Members of the Committee:

I am appearing today for Dr. Edward Knapp, Director of the National Science Foundation. Dr. Knapp regrets that a previously scheduled engagement with the science ministers of Europe prevents him from bringing our views to you personally.

Our concern at the National Science Foundation is with the health and vitality of the Nation's science and technology enterprise. The relatively minor changes in the antitrust and intellectual property laws you have already heard described could materially strengthen that enterprise and the competitive position of U.S. industry by encouraging useful industrial collaboration in research and development.

What is most needed in our view is a clear signal of Government recognition that research and development joint ventures are likely to serve the interests of consumers and the public and unlikely to harm competition. Such a signal could ease the antitrust anxiety that currently seems a deterrent to formation of procompetitive R & D joint ventures, encouraging businessmen to consider them further on their economic merits.

We also urge that such legislation neither impose unnecessarily detailed Government restrictions on the forms R & D joint ventures may take nor require Government involvement or approval before they can proceed. S. 1841, the National Productivity and Innovation Act of 1983, would send the right signal without unnecessarily intruding the Government in either of those ways.

This in itself would be sufficient to commend S. 1841 to your attention. We also hope, however, that the Committee will consider very seriously the provisions of the bill that would make U.S. patents and copyrights more secure and useful protections for the fruits of U.S. science and technology.

Potential Underinvestment in R & D

In our Nation's science and technology enterprise both intellectual property protections and R & D joint ventures are among mechanisms available to protect against underinvestment in commercially relevant research and development. At a time of greatly heightened international competition we can ill afford such underinvestment.

Moreover, it is vital that our individual industries invest sufficiently in R & D to compete successfully with their competitors in Japan, Europe, and elsewhere. No longer can U.S. policy afford to be concerned solely with competition within a U.S. industry. Competition between that industry and the industries of other countries may be equally important to us.

The danger that we will underinvest in commercially relevant R & D is real. It stems from two interrelated problems. One is that high cost, high risk projects worthwhile for an entire industry or the economy as a whole may be beyond the risk-bearing or self-insuring capacity of individual companies. The other is that an individual company may be unable to appropriate to itself a sufficient share of the fruits from its R & D investments.

When a company makes a capital investment of another sort and creates a new plant or production line, it owns and controls that plant and production line itself and can profit accordingly. When it invests in R & D, however, it creates new knowledge or techniques. If the new knowledge or technique gained becomes known to others -by publication, by reverse engineering, or however -- the company's competitors too may be able to take advantage of it.

This is less likely to happen, of course, if the R & D produces only an incremental improvement in a product or process more or less unique to the particular company. But it is more likely to happen in the more important case where the new knowledge or technique is more fundamental and applicable generically to more widely used technology.

Indeed, the knowledge or technique developed may turn out to be highly significant, but not in the performing company's business or markets. The company may at best be able to sell or license the technology it has developed to another company better situated. In this way too the performance of R & D may be riskier for the individual company than it may be for the industry or the economy as a whole.

Unless something can be done to secure more of the benefits to the performing company, the incentive of the individual company to perform R & D, particularly of the more risky and fundamental kinds, will be reduced accordingly. The investment in such research by individual companies will not correspond with the potential benefits to an industry or to the economy as a whole.

Intellectual Property Protection and Proposed Improvements

An individual company may try to appropriate more of the benefits from its R & D by keeping the results a trade secret. Trying to maintain secrecy, though, requires considerable expenditures on security, deprives the company's researchers of professional recognition that goes with publication (which is particularly important for fundamental or basic researchers), and may not be successful for long.

From the point of view of the industry or economy as a whole, moreover, secrecy has further drawbacks. It risks uneconomic duplication of scientific or engineering effort. Several companies may attack the same problem in the same or a very similar way when only one or two need do so to achieve a particular scientific or technical result. Secrecy cuts off a company's researchers from cross-fertilization with researchers working on the same or similar problems in other companies. Such cross-fertilization often could result in speedier or more profound results. And secrecy obviously hampers dissemination and use of the new technology that is kept secret.

The intellectual property protections afforded by our patent and copyright laws provide a partial solution to the dilemma. Patent protection in particular allows companies to disclose inventions that result from corporate R & D without losing proprietary rights in them. S. 1841 would improve the protections afforded by the patent and copyright laws and so would strengthen incentives to invest in research and development.

Titles III and IV would ensure that before a court may conclude that particular licensing practices are illegal it will seriously consider, in light of economic evidence and analysis, whether those practices on balance actually stimulate competition and benefit the consumer. Economics analysis makes reasonably clear that though such practices may put a company's competitors at a competitive disadvantage (as successful business arrangements tend to do), that does not prove they are anticompetitive. On the contrary, as has been pointed out by others, these practices may be particularly vital to smaller companies with little market power. Title III would also make the intellectual property protection at a company's disposal more secure by preventing "strike suits" for triple damages based on such licensing practices.

Finally, Title V would correct a loophole in American law by ensuring that when an industrial process is patented in the U.S., the U.S. patent cannot be circumvented by using the patented process in another country to make products that are then imported into the United States. Other countries allow no such circumvention of their patents. Heightened international competition gives new urgency to strengthening our own patent protection by correcting this defect.

We recognize, however, that even if thus strengthened, intellectual property protections represent only a partial solution to the problem of underinvestment in R & D by individual corporations, particularly at the more fundamental or "basic" end of the science and technology spectrum. By no means all the fruits of R & D are fully covered. Indeed, the most basic scientific discoveries, likely the most important, cannot be patented at all.

Role of R & D Joint Ventures

Federal support of fundamental science and engineering research in Government and university laboratories can be seen partly as another response to the likely underinvestment in research and development caused by limitations on the risk-bearing capacity of individual companies and by inappropriability of research results. Supporting that kind of research is our primary business at the NSF.

This sort of Government-supported research is driven to a greater extent than corporate R & D by the internal development and growth of scientific and engineering knowledge. It has been enormously fruitful for the U.S., and never more so than recently. In development of industrial technology, however, it does well primarily as a supplier of generically applicable knowledge and techniques. It lacks, in particular, the close coupling with production and marketing realities and the spur of competition that are the strengths of the corporate R & D lab.

Between the generically applicable basic and applied research which the Government supports effectively and the more specifically appropriable R & D for which individual companies ordinarily can justify the costs and risks lies a middle ground -- some would say a gap -- in which underinvestment may remain a problem.

This "middle ground" cannot be simply characterized. Its locus varies with the nature of the science and technology in question and from industry to industry. It may be typified, however, by the frontier science or technology that promises broad commercial application and value in five, ten, or fifteen years, but still poses great risk for an individual company.

R & D joint ventures are one of several mechanisms by which we can help ensure that the U.S. invests adequately in this middle ground.

Bell Laboratories and a few other corporate research laboratories can and do move into and even across the "middle ground". They even do some basic research not easily distinguished from research the NSF supports at universities. But this has been possible only for very large companies with sufficient market shares to anticipate appropriating substantial shares of the benefits from such research. It is no accident, for example, that Bell Labs is part of a large company that has long held a near-monopoly position in its industry.

The middle ground is also entered by small companies spun off from university research, as in Silicon Valley of California and around Route 128 in New England. Industry association R & D activities and industry-wide R & D consortia like the Electric Power Research Institute also contribute.

Industry-university collaboration -- from consulting arrangements with individual professors to joint research projects to major industry-supported research centers on campus -- have lately been mushrooming with active support from the National Science Foundation. Such collaboration too may be regarded as a means of filling the middle ground.

The recent increased interest in R & D joint ventures that has given rise to suggestions for a less restrictive and threatening antitrust regime is another part of the same picture. It derives from the same increased awareness that in an era of accelerating technology development, increasingly complex and costly R & D, and heightened international competition, the United States and specific U.S. industries need to be concerned about research and development that a typical corporation cannot take on alone.

In this context the potential advantages of an R & D joint venture seem substantial. By spreading costs and risks a joint venture may hold the individual company's share of costs and risks within its capacity. It may also better . match the individual company's share of the costs and risks with the share of the benefits it can hope to receive. A joint venture may thus allow more risky, fundamental, and somewhat longer-term R & D than any individual company would support on its own. Nonetheless the work could stay in the private sector, where it can remain in contact with production and marketing realities.

An R & D joint venture may also eliminate unnecessary and unwitting duplication of work by two or more R & D labs working in the same or similar areas. It may allow researchers to communicate more closely with one another, speeding their work and allowing connections to be seen and conclusions drawn that otherwise might be missed.

Particularly significant in the antitrust context, an R & D joint venture may allow for more effective competition. It may enable the smaller fish in an industry to compete effectively in R & D with larger and more dominant competitors. Apparently, for example, Control Data has made R & D joint ventures a key part of its strategy for staying competitive with IBM, and one expression of this strategy is the Microelectronics and Computer Technology Corporation (MCC), the highly publicized joint venture of which Control Data was the original chamipion. IBM is not a member.

Similarly, R & D joint ventures may enable U.S. industry to compete more successfully with foreign industry. This too seems to be a major motive for formation of the MCC and of the Semiconductor Research Cooperative (SRC), another microelectronics industry consortium that primarily supports university based R & D. Other nations, notably Japan, have actively encouraged joint research and development; U.S. companies may need similarly to work together in the new era of international competition.

Antitrust Reform to Encourage Research Joint Ventures

Despite these advantages, R & D joint ventures among U.S. companies have been sparse, at least until very recently. In one three-year period (1977-79), a study based on published reports of joint ventures identified only 21 joint R & D ventures with no production or marketing components. Some others may have been unpublicized, and the numbers have likely increased in the last two or three years. Even so, this is quite a small number.

Why so few? There are purely economic reasons of considerable and possibly overriding importance. Firms may fear to surrender a competitive edge by sharing proprietary information or by foregoing the possibility that they could achieve breakthroughs in competitively important areas on their own. Firms that are already strong in R & D seem particularly concerned that an R & D joint venture will give weaker competitors a free ride.

Clearly, however, antitrust fears are also a significant deterrent. That is the preliminary finding of a Yale group's current research on R & D joint ventures. It is confirmed by numerous conversations with business executives and lawyers, including those who have been involved in putting together recent ventures. Paradoxically, antitrust anxiety seems greater in small to medium sized firms, which presumably have less to fear from the antitrust laws, than in larger firms with greater market power, but also greater antitrust sophistication.

The level of antitrust anxiety seems surprising considering the record, which reveals little or no antitrust action against pure R & D joint ventures, either by the Government or by private plaintiffs. That may in part simply reflect the small number of such joint ventures that have until recently been formed. In part, it reflects the special threat of triple damages and the incentive they give to lawsuits that can be costly to defend even if they are won. And in part it reflects the discomfort of businessmen accustomed to constant warnings and worries about concerted activity when counsel cannot remove all uncertainty that an R & D joint venture might be in the same legally dangerous category. Indeed, until the relatively recent 1980 issuance of the Justice Department's Antitrust Guide Concerning Research Joint Ventures, there was little official indication that an R & D joint venture would be considered different and more likely procompetitive than other forms of concerted activity.

Some of the current legislative proposals would try to reduce antitrust uncertainty by providing a safe haven if a joint venture meets specific requirements concerning entry, structure, licensing and the like. Others would try to accomplish the same thing through precertification by the Antitrust Division. Though the objective is undeniably attractive, each of these mechanisms has drawbacks that lead us on balance to recommend against them.

The specific requirements of the "safe haven" formats would not reduce all uncertainty. On the contrary, they would create new uncertainties about the content of new and undefined terms not yet tested in the courts. More seriously, they would tend to force R & D joint ventures into rigid molds, perhaps even exacerbating antitrust anxiety about ventures that do not meet one or more of the requirements. This may have the effect of excluding other forms of joint venture that can be equally desirable.

We question, for example, whether all joint ventures should have to be open to all comers and whether the venture should be required to license to nonparticipants who have not shared the costs and risks.

Firms will undertake R&D, whether individually or collaboratively, only if they judge it to be in their long-term interest as likely to result in some competitive advantage. Competitive advantage, however, requires some measure of exclusivity in the technology that is developed. If marketable products or processes result, it also means the ability to decide whether or not to license competitors and at what rate. If the venture does decide to license the product that emerges, it ought to be allowed to set a fee that reflects not only the costs associated with that particular product or process, but also the costs of other R&D projects that didn't come to market. Otherwise, the licensee gets a "free ride" -- it benefits from the successes of the venture, but avoids the costs and risks of failure.

We also share the concern of the antitrust authorities that the "safe haven" could unexpectedly put truly anticompetitive activities beyond the reach of antitrust enforcement. The terms of the antitrust laws, tested by time, are general and correspondingly vague for the reason that competitive or anticompetitive effect is not easily judged apart from the facts and circumstances of particular transactions.

Precertification by the Antitrust Division, besides putting Justice into an uncomfortable and arguably inappropriate regulatory role, carries a different sort of risk. Particularly considering that Justice would be asked to take a position in advance of any actual activity by the joint venture, caution would surely be the byword. Justice attorneys might under those circumstances require detailed information on how the joint venture will proceed, notwithstanding that research is inherently unpredictable, and might condition any certificate on detailed assurances. The venturers could end up tailoring the venture to satisfy the new Federal regulators and troubled by new uncertainties about whether all the conditions and assurances are being satisfied.

In short, we are inclined to worry that in this area as in others certainty will prove largely elusive or will be bought at cost of rigidity and bureaucracy. Either detailed legal requirements or Antitrust Division certification is likely to end with lawyers supplanting scientists and engineers in designing R & D ventures -- as good a way as I know to discourage such ventures. Businessmen do live with some uncertainty under the antitrust laws and other laws every day. What really seems needed here is just a clear signal that R & D joint ventures are relatively favored under the law -- that such joint ventures are seen as more likely to be procompetitive than other forms of concerted action by competitors. S. 1841 would accomplish this by denying any possibility that such a venture would be considered a per se violation and by eliminating triple damages for any violation. These changes would carry none of the risks and rigidities entailed in "safe harbor" requirements or Justice Department precertification, but they would suffice to send the necessary signal to lawyers and businessmen alike.

In our experience the symbolic effect of such a move could be even more important than the actual legal changes. A few years ago Congress provided in the Bayh-Dole Act that universities and small businesses were to be entitled to patent rights on inventions developed in the course of Federally supported research. At our Agency and most others this changed existing law and practice very little, if at all. Yet the change in perceptions that followed was remarkable. Businessmen who "knew" that the Government always took contractor patents suddenly became willing to consider business dealings with the Government and with university researchers supported by the Government that before they would have thought out of the question.

Here too the problem today may be less the actual state of antitrust law and enforcement than the perceptions of businessmen, lawyers and judges. The relatively modest changes in the law that S. 1841 would make could importantly alter those perceptions to the benefit of U.S. science and technology.

The CHAIRMAN. Is Mr. Niskanen in the room?

[No response.]

The CHAIRMAN. Without objection, his statement will go in the record then. And we would like to request of him to respond to some questions that we will prepare.

I think that completes the hearing. We thank all of you for coming. We now stand adjourned.

[The committee adjourned at 10:45 a.m., to reconvene at the call of the chair.]

[The prepared statement of Mr. Niskanen follows:]

PREPARED STATEMENT OF WILLIAM A. NISKANEN, MEMBER COUNCIL OF ECONOMIC ADVISERS

Mr. Chairman and Members of the Committee:

I welcome the opportunity to appear before you today to testify in support of S.1841 "The National Productivity and Innovation Act of 1983." My prepared remarks are addressed principally to Title II of the Bill, "Joint Research and Development Ventures," although I endorse all provisions of the Bill and I believe that much of what I have to say applies with equal force to the entire Bill. My point will be a simple one: we ought to act to encourage research and development, and making changes in the antitrust laws to facilitate pro-competitive joint R&D programs among private entities is an appropriate way to provide such encouragement.

I am sure that I need not elaborate for this Committee the importance of technological innovation for the vitality of our economy. Innovation leads to greater productivity and lower inflation; it also provides a competitive advantage in world markets and greater employment for American labor.

What may be less well known to the Committee is that there appears to have been a slowdown in the rate of innovation in the United States over the last fifteen years or so. While the concept of "rate of innovation" is not well defined and the evidence for the proposition is cruder and more limited than one would like, the data suggest such a decline has occurred. The number of United States patents granted annually has been falling since about 1971. Indeed, in virtually all fields for which data are available, the number of patents granted to U.S. inventors fell annually during the decade of the 1970's. The inference that the rate of technological innovation is declining is bolstered by a number of industry-specific studies that have concluded that the pace of introduction of major innovations in each industry studied, with the notable exception of the microelectronics industry, slackened over the same period.

This decline in the rate of United States technological innovation has been attributed to a number of causes. Between 1964 and 1978, R&D expenditures as a percentage of gross national product fell by more than 25% (from 3.0% to 2.2%). More recently, probably as a result of declining real GNP and the enactment of a 25% tax credit for incremental R&D expenditures as part of the 1981 changes to the Internal Revenue Code, the percentage increased to 2.6%. There is substantial econometric evidence, moreover, that the rate of return on investment in research and development declined from historical levels during the 1960's and 1970's. Among the more plausible explanations for this development are that government regulations and foreign competition have reduced the value of the patent monopoly, and that, over time, less costly and risky research opportunities have been exploited, leading to increased capital requirements and more risk for those research ventures that remain to be undertaken.

Given the importance of technological innovation to our economy and these historical trends, the government should review its regulatory policies that may adversely affect the expected return on investment in research and development to determine whether the appropriate balance has been struck between competing interests. Modification of the antitrust laws with respect to joint R&D ventures, as proposed in S. 1841, would appropriately reduce the risk of and increase the return from such activities.

For a number of reasons, joint research and development programs serve an important economic function by reducing transaction costs and overcoming market imperfections.

Research and development usually requires highly-trained, specialized and talented personnel and very specialized technology inputs. Regular markets do not exist for such inputs in the sense that they do for inputs for other productive ventures; rather, the required technology and specialized personnel may be available in only a small number of firms, perhaps only a single firm, especially in the case of patented technology. In such circumstances there may be substantial costs in negotiating agreements and grave risks incumbent in relying upon a single supplier.

Moreover, firms buying and selling technology often do so with asymmetrical information. Frequently, the seller is reluctant to disclose fully its technology until the buyer is contractually bound; likewise, the buyer may be unwilling to disclose fully its knowledge and intentions. Both parties operate with imperfect information as to the value of the technology, which will be affected by their own conduct, including future research and development of a related character.

The consequences of the small numbers of buyers and sellers, asymmetrical information, and uncertainty is that the conduct of R&D ventures using inputs from without the firm has high transactions costs and greater risks than R&D conducted using inputs, technology and personnel wholly within the firm. There is evidence that joint ventures, technology sharing and licensing agreements, and the like are attempts by the parties to overcome these problems and to share the risks of the undertaking. The existence of such joint R&D ventures and agreements, thus, has the salutory effect of encouraging R&D that might not otherwise be undertaken, and presumably, of thereby increasing technological innovation.

Joint ventures and agreements of the sort referred to are, for a number of reasons, more expensive and difficult than projects undertaken within a single firm. One important cost arises from the risk of antitrust sanctions. Even if the undertaking is not anticompetitive, the joint venturers will generally face an actuarial expectation of antitrust expenses.

Such ventures and agreements invite antitrust suits brought by competitors or customers. Such suits can be expected to give rise to great litigation costs, and there is always the possibility that very substantial treble damage verdicts would result.

Undoubtedly joint R&D ventures and agreements pose the potential to become anticompetitive arrangements. It is entirely appropriate to provide legal sanctions to deter such behavior. The existence of laws intended to deter anticompetitive behavior, however, will also chill other behavior, not anticompetitive, because of the risk such innocent behavior will be subject to judicial error or become illegal because of changing judicial standards, or because innocent undertakings may cross the line into prohibited activities. Increasing the severity of the sanctions for antitrust violations would increase the deterrent effect upon prohibited activities, but it would also impose a greater risk-bearing cost upon economic undertakings that are legitimate, even pro-competitive and, at the margin, may so reduce the expected returns as to discourage them altogether.

A balance must be struck in defining antitrust penalities that weighs the benefits of deterring anticompetitive effects against the costs of chilling lawful and socially desirable activities. In general, the balance favors greater sanctions when violations are difficult to discover and prosecute and when there is little danger that lawful activities will be prosecuted and, conversely, lesser sanctions when violations are more easily detected and prosecuted and when more lawful activity will be chilled.

With this in mind, the provision of S.1841 that would trade off disclosure of a joint venture to the Federal Trade Commission and the Department of Justice in return for a limitation of exposure in private antitrust actions to single damages, costs (including attorney's fees) and interest is highly desirable. Disclosure of the relevant aspects of the joint R&D program should facilitate detection and prosecution of antitrust violations. Joint R&D programs that are not anticompetitive are likely to be desirable in increasing technological innovation, and may increase competition by allowing smaller firms to undertake R&D activities on a scale otherwise practicable only in substantially larger firms. The behavior to which S.1841 is addressed is distinguishable from other kinds of potential antitrust offenses. Whatever the desirability of private injunctive relief and treble damages for secret collusive practices, there is no reason to believe that the penalties ought to be the same for a joint R&D program whose terms have been disclosed to authorities invested with the authority and expertise to police them. And while little is to be gained from restrictive practices concluded in secret, joint R&D ventures and agreements that are fully reported to the government should serve the public interest.

Likewise, provisions of S. 1841 that would reduce damage exposure in connection with the licensing of intellectual property (Title III) and constrain the judicially-created doctrine of patent and copyright misuse (Title IV) should serve to increase the return on R&D activities, and thereby encourage technological innovation, without unduly decreasing deterrence against anticompetitive activity. Licensing is an important mode of sharing risks and benefits from R&D activities among firms too small to internalize the entire research, production and marketing efforts. An expansive doctrine of patent and copyright misuse chills investment in intellectual property by threatening investors with a loss of exclusive rights in the results of their efforts for behavior not transgressing established antitrust law. Restricting use of the doctrine to conform to the bounds of established antitrust law is a prudent and desirable way to reduce the riskiness of such investment and, thus, to encourage innovation.

THE NATIONAL PRODUCTIVITY AND INNOVATION ACT AND RELATED LEGISLATION

MONDAY, MARCH 12, 1984

U.S. Senate,
Committee on the Judiciary,
Washington, D.C.

The committee met, pursuant to notice, at 2:05 p.m., in room SD-226, Dirksen Senate Office Building, the Hon. Strom Thurmond, (chairman of the full committee) presiding.

Also present: Senator Metzenbaum.

Staff Present: W. Stephen Cannon, chief counsel for antitrust; Joseph H. Gibson, research assistant; and Steve Ross, counsel to Senator Metzenbaum.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The Chairman. The committee will come to order.

Today, the committee completes its hearings on the antitrust implications of joint research and development ventures. Over the past several years, this committee has been actively studying whether there is a need to both clarify and reform our antitrust laws to promote greater research and development activity. Many in this Congress, including myself, have concluded that there is such a need.

On Thursday, March 15, the committee will consider S. 1841, the National Productivity and Innovation Act of 1983. This legislation was sent to the Congress by the President. At the present time, it is my intention to offer an amendment to S. 1841 which would alter somewhat the provisions of title II concerning joint research and development ventures, and which would delete titles III, IV, and V relating to intellectual property.

My proposed amendment to title II of S. 1841 would preserve its basic features, which include a clarification that joint research and development ventures are subject to rule of reason antitrust analysis, and, upon notification to the Federal antitrust authorities, a single damage limitation against joint ventures which are found to violate the antitrust laws. In addition to these provisions, the amendment would also authorize attorneys fees for successful defendants unless such an award would be unjust under the circumstances.

It is encouraging to note that last week the Monopolies and Commercial Law Subcommittee of the House Judiciary Committee favorably reported H.R. 4963. This legislation, sponsored by Chairman Rodino and a large bipartisan group of committee members, is very similar to that which our committee is currently considering. I am hopeful that S. 1841 will be favorably reported by our committee on Thursday and then be promptly approved by the full Senate.

We are fortunate today to be receiving the testimony of so many distinguished witnesses. I particularly want to welcome Paul McGrath, who is making his first appearance before the committee as Assistant Attorney General in charge of the Antitrust Division today. It is also a pleasure to welcome Dr. Bruce Merrifield, Assistant Secretary of Commerce.

Does the distinguished Senator from Ohio have an opening statement?

Senator **METZENBAUM**. Yes, I do.

Mr. Chairman, I am very pleased that we are having this hearing. I think it is the first hearing where we have actually heard outside witnesses in connection with this legislation, certainly as far as hearing any of the opposition is concerned; I do not have any recollection of that.

I frankly am a strong supporter of American industrial growth, both the high-tech fields as well as traditional manufacturing industries. I have stated previously and I repeat today that I am willing to work with my colleagues on legislation that will aid and encourage research and development joint ventures, so long as such ventures do not harm competition. But, unfortunately, the bill that we are considering today and with the modifications that are contemplated by the distinguished chairman, in my opinion, go a little too far, maybe quite a bit too far. The administration proposal uses the popularity of high technology as a smokescreen for legislation to overturn our 70-year-old treble damage system of private antitrust enforcement. S. 1841 is, I fear, the first step in eliminating treble damages in antitrust cases.

I believe that, even with the distinguished chairman's amendment, we will not be impacting upon that avenue and that aspect of the legislation, because the new proposal would also go to the point of awarding attorneys fees to winning defendants. Now, let us not kid ourselves about that subject. You provide once in the law that you are going to award attorneys fees to winning defendants, and that is the end of antitrust litigation in this country. Is the small, little operator going to take a chance at some way that he may be called upon to spend $300,000 or $500,000 in attorneys fees? Of course not. And, as a consequence, this is what I would call the rape and emasculation of antitrust laws in this country, or at least the first step in that direction.

I support the concept of this bill, the bill having to do with permitting joint R&D efforts. But, if the proponents of that legislation hope to get it through without a lengthy and troublesome battle and with a good chance of not being victorious, then I think they have to take another look at the treble damage and the attorneys fees question. The attorneys fees question, in my opinion, is particularly egregious. I think it may very well be the basis of causing the defeat of what which might otherwise be a meritorious proposal.

As I mentioned before, no public witnesses have yet had a chance to testify specifically with respect to S. 1841. In the prior hearings, we heard from the industry witnesses that they feared unknown antitrust liability resulting from uncertainty in the antitrust laws. Of course, any defendant, whether it was involved in joint R&D efforts of whatever, would prefer to avoid the risk of a treble damage liability. But the clear thrust of the industry testimony was that Congress should act to clarify the antitrust laws as they apply to these joint ventures. I have no problem with that, and I am willing to try to do that.

The Office of Technology Assessment prepared a 600-page study of international competitiveness in electronics. Interestingly, it devotes only 2 paragraphs in 600 pages to antitrust. OTA concluded that some businessmen fear antitrust liability due to uncertainty. Not once is there any mention of eliminating private remedies as a viable solution to this problem.

I believe that private enforcement is an essential cornerstone of our antitrust law. Now more than ever, when the Reagan administration has radically moved away from decades of bipartisan antitrust policy toward a refusal to enforce the law as passed by Congress and interpreted by the Supreme Court, we need private enforcement.

Make no mistake. This bill does not merely limit private enforcement. It effectively abolishes it.

As we explore this bill today, I am confident that it will become clear that any antitrust litigation in the research joint venture area will be difficult and complex. To prevail, a private plaintiff or State attorney general will have to marshal a great deal of information, typically in the hands of the defendants, to prove that a challenged venture does in fact harm competition. These cases are very difficult to win under even current standards. But, if we change the rules and take away treble damages and further deter plaintiffs by threatening them with paying enormous fees to the defendant's attorneys, I believe few if any plaintiffs would be so hardy as to vindicate themselves and the competitive process.

I think it says a great deal about the problems with S. 1841 that, literally on 24-hours' notice, such a distinguished group of witnesses agreed to testify today to express their concerns with this first troublesome step on the road to abolition of the treble damage remedy. When law enforcement officials, private practitioners, academics, and consumer advocates all call for caution, I believe their voices should be heard.

Again I want to emphasize that I would support sound legislation to encourage procompetitive joint ventures, but I cannot and will not stand by and watch our private remedies abolished under the guise of high technology. I would again say that, if we are to move legislation to make it possible to clarify the situation with R&D joint ventures and to do that promptly, we could probably pass that legislation within 2 or 3 days. But, when that legislation moves into the area of abolishing treble damages and providing for attorneys fees to be levied against the plaintiff, then I think we run into a very controversial area. I think that it indeed jeopardizes the passage of the basic thrust and purposes of this proposal.

Thank you, Mr. Chairman.

The CHAIRMAN. I might say before we begin the testimony, Senator, that I would like to respond to the statements you made about single damages and attorneys fees. Last year, the Congress passed a bill, an act to encourage exports by facilitating the formation and operation of export trading companies, export trade associations, and the expansion of export trade services generally. This bill provided for single damages. This bill provided for attorneys fees. The present bill we are offering here now leaves it up to the judge to determine whether attorneys fees should be provided. The bill last year did not even do that. I did not hear the Senator object to that bill on those two points when it went through.

Senator **Metzenbaum**. I think that the chairman very much helps to make my point. And that point is that as soon as you open the door a little bit, everybody comes rushing forward saying, well, if you could have done it for the export situation, why can't you do it for domestic operations as well? As a matter of fact, in that bill you have to have prior administration approval before you get that protection. That is not provided for in this proposal.

There is a difference when you are talking about violating antitrust laws with respect to exports as compared to violating antitrust laws that have an impact upon the American economy.

I think that, when that bill came before us, the proponents argued that the bill was needed for international comity. This is not needed for international comity.

I would say that you prove so well the very point that I make. That is, in this area with legislation, when you get an exemption for the beverage distributors, it is only weeks thereafter before somebody comes along and wants an exemption for the beer distributors. And you just eat away at the efficacy of the laws.

I think that we probably should not have gone as far as we did in connection with the Export Trading Company Act of 1982. I think in retrospect maybe it was a mistake. But one mistake should not be compounded by an even more egregious one, as this would be in this instance. And if I can help it, we are not going to pass the law in this form and deny treble damages or take action with respect to awarding defendants legal fees as against the plaintiffs

The **Chairman**. I want to call attention to the fact that this bill did provide for single damages. This bill provided for mandatory attorneys fees. The bill under consideration provides single damages. It does not provide for mandatory attorneys fees; it leaves it to the court. So, the Senator did not oppose the bill that goes further than the present bill. I just did not understand that.

Senator **Metzenbaum**. Well, maybe you have proven to me the old adage. I think it goes something like this: If you fool me once——

The **Chairman**. Maybe the Senator felt he had overlooked something, so we will pass on.

Senator **Metzenbaum**. I am not sure whether I did. I do not recollect the circumstance, but I will say this. I have not overlooked the terms of this proposal, Mr. Chairman.

The **Chairman**. Mr. McGrath, we are very pleased to have you with us. We have a few questions here after you make your statement. Your statement is about nine pages long. Would you care to put the entire statement in the record and then summarize it for us?

Mr. **McGrath**. I would very much appreciate it if I could do that, Mr. Chairman.

The CHAIRMAN. Without objection, your entire statement will go in the record. Please summarize it for us.

STATEMENTS OF A PANEL CONSISTING OF J. PAUL MCGRATH, ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, U.S. DEPARTMENT OF JUSTICE; AND D. BRUCE MERRIFIELD, ASSISTANT SECRETARY OF COMMERCE FOR PRODUCTIVITY, TECHNOLOGY AND INNOVATION, U.S. DEPARTMENT OF COMMERCE

Mr. McGRATH. I am pleased, Mr. Chairman, to be here this afternoon to testify with respect to a legislative effort to stimulate research and development, to stress the strong administration support for S. 1841, and to comment on the proposed amendments to that bill.

I believe that there is a very real need for legislation in this area. We all agree that research and development and the stimulating of research and development are critical today. I believe we all agree that in many contexts joint efforts between or among different companies are critical, because in this fast-moving world different companies often have different pieces of the research and development puzzle. If they cannot put them together, we cannot make advances that otherwise we should make.

The real question is, how do we accomplish the goal that I believe everyone wants to accomplish? I would say—and I base this not just on my experience in my current position but on years of counseling clients in areas such as this—that the real problem is the uncertainty in the law. There are some old cases that suggest flat out that any joint venture among corporations is per se unlawful. I do not think anybody really believes that those cases would be decided similarly today. Indeed, more recent cases have suggested that they would not be. The problem is, when you are counseling a client on something as delicate as a joint venture, the fact is that when you look at the case law, you find these cases sitting there, essentially unoverruled. That tends to throw some cold water on the advice you give. Therefore, that, added to the trickiness in any event of research and development joint ventures caused by the uncertainty of what happens when you disclose your technology——

The CHAIRMAN. If you will wait just a minute, I see a good many people standing in the rear. I think you would be more comfortable if you come around and take a seat. There are seats available on this side.

You may proceed, Mr. McGrath.

Mr. McGRATH. I was saying, Mr. Chairman, that those factors have a negative influence when companies are seeking advice on whether they should put together a joint research and development venture. Thus, I feel very strongly that the law in this area should be amended to make it clear that rule of reason treatment is appropriate.

Second, treble damage treatment is very troublesome in this area. The problem is that the kind of exposure companies can face can be very large. You are talking about a research venture, and by definition the size of the exposure is unknown because you do not know how successful it will be. Yet, if the venture is very successful, that is precisely the point where the exposure will be the largest.

One of the problems with applying treble damage rules to this area is that the more cautious companies may be inclined to bring everyone into the research and development joint venture because of the threat of treble damage exposure, which may lead to overinclusion of companies in the joint venture, which in itself can be anticompetitive in many situations.

We believe, in short, that changing the law in this area to a single damage treatment is very important. That, I would like to say, does not mean that we regard this bill as a kind of a stalking horse for general detrebling. I personally would oppose general detrebling. I think particularly in the per se areas that treble damages are a very important deterrent.

In addition, I think that, before anything more general is considered in the area of detrebling, we ought to wait to see what results are reached in current empirical studies being done on that subject, in particular a study that is being done under the supervision of Dean Pitofski of Georgetown Law School, and others.

The proposed amendments to 1841, obviously, first include the eliminations of titles 3, 4, and 5 from the proposed legislation. We believe those are veiy important subjects, the subjects of intellectual property licensing and patent misuse, and so on. We do agree, however, that at this time they could stand more study. And given the realities of the number of days in this legislative year, we believe it is appropriate to separate out those areas, although we do regard them as very important. We hope that work will continue on them.

The other amendments to 1841, the amendments to title II, are also acceptable because they make clear that the rule of reason would be applied in this area and that single damages would be the remedy if there is any violation of the antitrust laws found by the court.

We believe that S. 1841 and the balanced approach that it represents is superior to other alternatives. Just briefly, some have proposed that there be what have been referred to as safe harbors in this legislation. We believe that is not a good idea because it is impossible to lay out precise standards in an effective fashion. Many of the proposals that have been made along these lines would include mandatory licensing. That, we believe, is inappropriate because it would actually deter joint research and development ventures.

It has also been suggested that perhaps some kind of Government certification should be necessary before an immunity or a relaxation of the treble damage rules is permitted. We believe that also would be a mistake because it would make the Government the decider of what research and development ventures should be undertaken. It would add costs and delay to the procedure.

We think that generally the approach taken in the amendments to 1841 is a properly balanced approach. In general, there has been no historic showing that joint research and development ventures are anticompetitive. There is a showing that the current uncertainness of the law may lead to some inhibition on competitive research and development joint ventures. The proposed statute is an effective and balanced way to see to it that those artificial inhibitions are removed without, however, going too far.

Thus, we would encourage the rapid enactment of this bill, particularly given the broad support that it has in both Houses of Congress and on both sides of the aisle in both Houses. Thank you very much, Mr. Chairman.

[Prepared statement follows:]

Department of Justice

STATEMENT OF

J. PAUL McGRATH
ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION

Mr. Chairman and Members of the Committee:

I appreciate the opportunity to appear before the Committee to discuss the continuing need for legislation to stimulate innovative joint research and development. I will also comment on proposed amendments to S. 1841, the National Productivity and Innovation Act, that the Committee has under consideration.

In testimony before this Committee on October 26, 1983, then Assistant Attorney General Bill Baxter emphasized the importance of joint R&D to enhancing innovation and detailed proposals of the Administration designed to encourage such productive activities. Since that time, this Committee and several other congressional Committees have been studying the many bills that have been introduced in the joint R&D area in an attempt to fashion the best possible legislation. Congress must now decide whether it will enact joint R&D legislation this session. On behalf of the Department and the Administration, I strongly endorse the efforts of this Committee to report such a bill.

The need for legislation that would clarify and to some extent modify the application of the antitrust laws to joint R&D remains strong. Some early antitrust precedents involving non-R&D joint ventures can be read as applying per se prohibitions against joint ventures among competitors. Other, more recent cases evince a more sympathetic judicial attitude towards collaborative R&D efforts. Indeed, the most recent case involving joint R&D very clearly applied a rule of reason standard rather than per se rules. But while the Department of Justice has attempted to make clear that there is, in general, substantial consistency between joint R&D and the antitrust laws, there is little precedent to assure businessmen and their attorneys that some courts will not condemn at least some joint R&D out of hand.

The antitrust problem in the area of joint R&D is this perception--I should say misperception--that the antitrust laws constitute a barrier to joint R&D. The perception translates into a business risk--the risk that after substantial investments are made in joint R&D, the venture participants may be threatened by unfounded antitrust challenges by unincluded, disgruntled competitors. And this risk increases as the joint venture becomes more and more successful.

The mandatory trebling rule in antitrust damage cases further exacerbates this risk. Treble damages increase the incentives for competitors to challenge the joint R&D efforts of others in the hope of convincing a court that some aspect of the venture is a per se violation of the antitrust laws. The very threat of such challenges may induce participants in joint R&D to adopt overly inclusive, anticompetitive membership policies. It also may thwart attempts to put together procompetitive joint R&D at their very outset.

In considering the significance of this problem, one must remember the fundamental importance of research and development and the technology it produces to a free competitive economy. And one must also keep in mind that in recent years R&D has become increasingly more complex and expensive. As the cost and sophistication of R&D have grown, so too the economies of scale that can be obtained from joint efforts have grown. There may be some R&D that no single firm is willing or able to perform alone. Indeed, it is likely that joint R&D will become increasingly important and that any unwarranted antitrust deterrence to joint R&D will become even more of a problem in the future.

It is for these reasons that the Administration proposed legislation to clarify and modify the application of the antitrust laws to joint R&D as the first substantive provision in the National Productivity and Innovation Act. We remain committed to such legislation. Moreover, we continue to believe that by far the best approach to this problem is a bill along the lines of Title II of S. 1841.

Let me turn now to the proposed amendments to S. 1841 that are under consideration by the Committee. These amendments would strike Titles III, IV, and V of the bill, which deal with intellectual property licensing, patent misuse, and increased protection to holders of U.S. process patents. They would also amend Title II of the bill, covering joint R&D, in ways to which I will turn in a moment. First, however, I want to say a word about the deletion of Titles III, IV, and V.

The Department believes that the changes that would be made in existing antitrust and intellectual property law by these three titles are needed to improve the incentives for the development and protection of new ideas--the very essence of the competitive process that we must foster if we are to keep pace with our overseas competitors. We must ensure that inventors are provided with adequate rewards and that the law does not misperceive procompetitive technology licensing as being somehow inimical to the public interest. The Department thus continues to support enactment of Titles III, IV, and V. We recognize, however, that the changes that would be made in existing law by these titles deserve adequate study, and we are willing to accept the judgment that it would be best to proceed with Title II alone rather than to incur any further delay that might be occasioned by such study. Nothing should be allowed to jeopardize the speedy enactment of legislation to remove the impediments currently facing joint R&D.

The amendments to Title II of S. 1841 do not change its basic approach. As amended, Title II would clarify the antitrust standard applicable to joint R&D and would give participants in joint R&D the opportunity to notify the antitrust enforcement agencies of their programs, thereby limiting their possible antitrust liability to actual, rather than treble, damages.

Section 201 of Title II contains necessary definitions; the amendments do no more than define additional terms for clarity and consistency with other provisions of the title.

Section 202, one of the two substantive provisions of the title, would not be changed by the proposed amendments. Section 202 states clearly and unequivocally that joint R&D is not to be considered illegal per se under the antitrust laws. Section 202 thus assures consideration of the actual competitive effects of joint R&D under the rule of reason. This is not new law, but it is an important clarification in that it would eliminate any misconceptions that present law imposes sweeping and categorical rules against R&D conducted jointly among competitors. It would also send an important message to the courts that they must recognize the benefits of joint R&D.

Section 203 of Title II would be rewritten slightly by the proposed amendments, along the general lines of a comparable House bill, H.R. 5041; however, the proposed amendments would not change the substance of the section. The amended section modifies existing antitrust law to limit recoveries in cases challenging joint R&D to actual damages, interest on such damages, and a reasonable attorney's fee. One of the conditions for such protection has been changed slightly. The Department has no objection to the amendments of this section.

The amendments also add a new subsection (c) to section 203 which would limit recoveries in cases brought against joint R&D under state antitrust laws in a similar manner. We also have no objection to this addition; it merely embodies the recognition that continuing treble-damage exposure under state law could vitiate the protections of Title II against treble damages under federal law.

The proposed amendments also would rewrite section 204, which sets out the manner in which participants in joint R&D

may obtain protection from treble damages by notifying the antitrust enforcement agencies of their program. The changes would conform the section to a comparable provision in H.R. 5041. Most notably the amendments eliminate the business community's primary objection to Title II's notification scheme by assuring that all information received by the government under the scheme will be treated as confidential and will not be freely disclosed to competitors. We do not object to any of the changes that would be made in section 204.

Section 205 is a new provision that has no counterpart in S. 1841 as originally introduced. This section would provide for the award of reasonable attorney's fees to defendants who prevail in antitrust cases challenging joint R&D that has been disclosed to the antitrust enforcement agencies. While the Administration did not include such a provision in its proposal and has no position on the inclusion of such a provision, we would not oppose the amended Title II on that basis.

As originally introduced, and as it would be changed by the amendments currently under consideration by the Committee, the balanced approach of Title II of S. 1841 is far superior to other proposals. Some of those alternatives could have serious adverse competitive effects or could impose significant regulatory costs on both government and private industry.

Several proposals for joint R&D legislation contain so-called "safe harbor" provisions, setting out new standards that joint R&D efforts would be required to satisfy in order to obtain total antitrust immunity. Despite the best intentions of the drafters of such proposals, we believe that the proposals are fatally flawed. First, many of the proposed standards are plainly anticompetitive. For example, some require mandatory access to the fruits of any joint R&D effort, perhaps after some period of time. Such a requirement destroys the competitive incentive to engage in R&D in the first place. Other standards, while not inherently anticompetitive, undoubtedly will prove anticompetitive in certain circumstances.

Some proposals embody concepts and phrases that at best provide only superficial certainty. It is unclear how these general standards will be interpreted in specific contexts, upon an adequate factual record. In their search for antitrust "certainty" and their attempt to avoid litigation, such proposals unwittingly open the participants in joint R&D to endless antitrust litigation over whether their organization or activities comport with new and untested statutory language.

Many, if not all, of the safe harbor bills have the clear potential for channeling joint R&D efforts into particular modes. However, the modes dictated by the bills may be inappropriate or inefficient in a myriad of commercial circumstances in which joint R&D is likely to be important, if not essential. While these proposals do not require that joint R&D take a particular form, the urge to take the "safe" route may be so strong as to overcome efficiencies or other procompetitive virtues that could be derived from other arrangements. It would be ironic indeed if legislation designed to stimulate the diverse talents and approaches of American innovators were to lead instead to conformity and single, industrywide approaches. In addition, given the rapid pace of change in R&D techniques, it is likely that any statutorily-mandated form of joint R&D would soon become obsolete.

The proposals that rely on government certification or intervention to backstop safe harbor provisions entail significant regulatory costs. Moreover, they would essentially make the government an unwanted partner in all joint R&D. The government may do a number of things well; however, making business decisions for the private sector is not one of them.

Unlike the other proposals, S. 1841 as it would be amended takes a balanced, non-interventionist approach to the antitrust problems facing joint R&D. It is not part of some larger scheme of eliminating treble damages, nor do I believe its enactment should be interpreted as a precedent for general "detrebling," as it is sometimes called. Rather, the amended Title II of the National Productivity and Innovation Act, unlike the alternatives, simply recognizes that while it is important to reduce the antitrust risk confronting joint R&D, it is also essential to assure that in those rare instances where anticompetitive joint R&D cause injury, the injured party is properly compensated. It would be contrary to fundamental notions of fairness to deprive consumers and competitors of any right to legal redress when they are harmed by anticompetitive actions that manage to masquerade under the definition of joint R&D.

In summary, Mr. Chairman, S. 1841 as it would be amended by the amendments under consideration by the Committee is by far the best approach to promoting procompetitive, efficiency-enhancing joint R&D. It is important, timely legislation--a well-balanced approach to the problem that avoids the pitfalls of other bills. We encourage the Committee to move this legislation toward enactment as quickly as possible, and we offer whatever assistance we may be able to provide.

I will be glad to address any questions you or the other members of the Committee may have.

DOJ-1984-03

The **Chairman**. Dr. D. Bruce Merrifield, Assistant Secretary of Commerce, is on the same panel. Would you care to proceed now? Would it suit you to put your entire statement in the record and then summarize it?

Dr. **Merrifield**. It would, Mr. Chairman.

The **Chairman**. All right. Without objection, we will insert the statement into the record.

Dr. **Merrifield**. Thank you, Mr. Chairman. I am delighted to have this opportunity to express my views on S. 1841. Just briefly on the amendments, in support of Assistant Attorney General McGrath, these amendments, which would strike titles 3, 4, and 5 and would also amend title 2, are quite acceptable as written. We do not have any problem with those.

I think it is important to emphasize that every business now is in a world market, facing global competition. This is a new event in recent years. A tremendous explosion of technology has converted the domestic market to a world market and makes the antitrust laws a problem rather than a procompetitive device. No individual company in this country can compete with a whole nation that is targeting its business. All businesses now area in international markets and are being targeted by other nations. This is not only true of steel but petrochemicals and computers, fiberoptics, robotics, aerospace; almost every area of concern is now a world market in world competition.

I think it is very important to recognize that the United States used to dominate the world both in technology and industry. As much as 10 years ago, the United States was generating something like 75 percent of the world's technology, with only 5 percent of the world's population. Now our share is down to 50 percent. In another decade it will be a third. It is not because we are generating less. We will be generating more. It is because the other 95 percent of the world is now participating. Every nation sees technology as an essential ingredient for quality of life. They intend to participate. It is no longer a domestic scene, which was relevant to the earlier stages of the antitrust laws. Now we have a world market, and we are in world competition.

Collaborative efforts are going to be essential now for many of our companies to remain competitive in these world markets if we are going to play on a level-playing field. We have to distribute risk. We have to pool technologies where resources and capabilities are beyond the individual capacity or risk threshold of individual companies. This is an important essential ingredient for competition in these world markets.

At the present time, no legal counsel of any major company will allow his chief executive officer to risk treble damages, and criminal sanctions in a high-risk effort that involves a pooled R&D collaborative program. It is much more of a deterrent than you realize. Those of us who have lived in the real world for many years are very intensely aware of this. I think it is very important to understand that this is a very serious deterrent.

Beyond this is the rapid change of technology, which has generated something like 90 percent of everything we do know in the sciences just in the last 30 years. It will double again in the next 10 or 15 years. It is compressing the life cycle of products and processes enormously. It is 3 to 5 years in electronics now. It is 5 to 10 years in most other things.

It is very difficult for any company or any industry to dominate any area of business for any length of time. It is a different picture now. I think we have to recognize the pace of change, targeting industries, and global competition have created a new world which we have to address if we are going to be competitive in this world.

I want to emphasize that we have tremendous advantages in this country over every other nation. We have the most advanced technology. We put $10 billion a year into the fundamental pool of knowledge. No other nation does that. But translating that into useful products and processes is a high-risk, long-term thing. On average, it takes 7 to 10 years for an idea to become commercial. Only one out of twenty things that ever starts out in a laboratory ever produces a positive cash flow. It is very important then that we get the barriers out of the way and provide incentives for the innovative process if we are going to remain competitive.

We do have the best industrial infrastructure that can translate new things from early stages into useful products and processes. We do have the unique entrepreneurial culture in this country, which is so potent. We have the best capital development capability. We have the world's largest market and a common language.

We do have everything except we have barriers in the way that inhibit this very important process. We are not competitive now as long as these barriers do persist.

I, therefore, very urgently recommend that we change these laws to allow collaborative efforts for R&D. We are not talking beyond that, into the marketing or manufacturing levels. The R&D level is critical if we are going to remain competitive.

Thank you, Mr. Chairman.

[Prepared statement follows:]

STATEMENT OF
D. BRUCE MERRIFIELD
ASSISTANT SECRETARY OF COMMERCE FOR PRODUCTIVITY, TECHNOLOGY AND INNOVATION
BEFORE THE SENATE JUDICIARY COMMITTEE

Mr. Chairman and members of the Committee, thank you for this opportunity to express my views on S. 1841, the National Productivity and Innovation Act of 1983. In earlier hearings before this committee, Secretary Baldrige and Commissioner Mossinghoff testified on all four substantive titles of this bill. Today my testimony will provide additional comments on the need for Title II of the bill, which deals with amendments to the antitrust laws pertaining to research and development joint ventures.

In our view joint R&D programs have many procompetitive aspects. They reduce duplication, promote the efficient use of scarce technical personnel, and help to achieve desirable economies of scale in the conduct of R&D. Small firms are able to collaborate in joint research and development projects, which because of prohibitive costs, they could not do by themselves. Large firms are jointly able to tackle today's large and complex technological problems, which are often beyond the ability of single firms. Joint research efforts can help to stimulate domestic competition and are key factors in the ability of U.S. firms and industries to stay competitive in the international marketplace.

In part we need to encourage joint R&D at home because of what is happening abroad. Our major trading partners have focused collaborative efforts on research and development in high technology industries. These countries have intensive joint research and development certain hi-tech industries, where the U.S. has a technological lead. As a result our foreign competitors have been able to narrow the gap or to achieve preeminence in many of these industries.

Of particular significance to us currently is that Japanese antitrust law does not prohibit firms from conducting collaborative research and development in MITI targeted areas such as computers, microelectronics, electronic instruments, lasers, optical communication, robots, and aerospace. Earlier this year Mr. Kuzuhero Fuchi, Director of Japan's Institute for New Generation Computer Technology (NGCT), announced a ten-year collaborative joint research and development venture with industry to create a so-called "Fifth Generation" computer. With this program the Japanese hope to leapfrog the U.S. computer industry.

Similarly, French antitrust law does not deter French firms from conducting massive joint research and development projects in such areas as aerospace, telecommunications, microelectronics, energy, and conservation equipment. West German firms have been permitted under their antitrust laws to conduct joint research and development in computers, microelectronics, and electronic office equipment.

Further, the European Economic Community exempts several collaborative joint research agreements of individual member countries from the antitrust restrictions of Article 85 of its Treaty. For example, the European consortium Airbus Industrie led by France and West Germany has been able to conduct joint design, testing, and manufacturing, which assisted them in capturing roughly a quarter of the jet aircraft market in 1981. Prior to that, joint research and development had been authorized in such areas as nuclear oxide fuels and electronic components.

It is essential to our long-term economic well-being and the maintenance of competition on a worldwide scale that U.S. firms have the same opportunities to engage in joint research and development as their competitors.

Joint Research and Development in the U.S.

U.S. firms have consistently expressed the view that they are handicapped in competing in international markets because our antitrust laws inhibit joint research and development. U.S. firms are hesitant to invest heavily in joint research and development projects because of the fear of antitrust violations.

A survey done in 1975 by the Industrial Research Institute for the Commerce Technical Advisory Board found this fear of antitrust violation was a constraint on collaborative research. (The study was titled "Institutional and Legal Constraints to Cooperative Energy Research and Development".) The study concluded that this concern had a real impact on R&D planning by management.

The high risk perceived by U.S. companies in conducting joint research and development has persisted despite the Department of Justice "Antitrust Guide Concerning Research Joint Ventures," which attempts to clarify how the antitrust laws apply to a given set of facts. For one thing, guidelines by their nature have to be somewhat ambiguous to allow room for flexibility of enforcement policies.

The Business Review Procedure of the Department of Justice also has not dispelled industry's fear in this area. The Business Review regulations provide that upon a request setting forth proposed business conduct, the Department of Justice may issue a letter stating its present enforcement intention. It does not shield the venture from future DoJ challenge, and it is not binding on the courts in private suits.

The Innovation/Process Pipeline

In our effort to address the issue of joint R&D and devise effective policy solutions, we find it useful to think of the process of technological innovation as a "pipeline." This highlights the fact that technological innovation is a continuous process, and not a discrete event.

In general, innovation can be considered to have two major stages. The first stage is the invention. The second is translating that invention into a useful commercial product or process. The large majority of the cost, the risk, and the time is associated with the second stage. It is commonly understood that in major industries, it takes seven to ten years to move a significant new product or process through this pipeline. Perhaps one of twenty projects that starts out in the laboratory ever produces a positive cash flow. Innovation, therefore, entails high levels of risk, and if the national interest requires that the United States maintain world technological leadership, then it is also important to remove barriers to innovation and to provide appropriate incentives to undertake risks.

Without adequate incentives, much of the innovative, basic R&D that is done in the United States will never be translated into useful products or processes. For the "pipeline" to work properly, we need to remove barriers to collaborative effort and provide incentives to cooperate that will minimize risk. Also needed, of course, is an adequate supply of scientists and engineers; access to capital for R&D and machinery; sound management; access to critical information; and a stable economic environment that is conducive to business decisionmaking.

Our own review of the matter has led Commerce to conclude that Government policies and programs exert a major influence on the innovation process, including effects on the direction and rate of technical development. Influential factors include government procurement policies, R&D support, patent policy, antitrust, tax, education initiatives, and so forth.

Mr. Chairman, the fear of antitrust liability that has inhibited collaborative R&D and placed U.S. industry at a disadvantage in the international marketplace should be removed. Title II of the Administration bill makes the least change possible in the antitrust laws needed to encourage more joint R&D. Title II does not change the antitrust laws' impact upon marketing strategies or the actual sale of products. Consumers would not be affected since all illegal marketing activities, such as price fixing, would continue to feel the full weight of this nation's antitrust laws. Attempts to monopolize would still be subject to the Sherman Act. Title II of S. 1841 contains what I believe to be the essential elements needed for reform of the antitrust laws governing joint R&D. These reforms will enable U.S. firms to compete effectively with their international competitors. The bill promotes procompetitive R&D joint ventures by limiting liability to actual damages plus prejudgment interest. Further, the bill directs that in antitrust suits challenging R&D joint ventures, the courts must weigh the procompetitive benefits of the venture against any anticompetitive effects in a "rule of reason" analysis.

Let me now turn to the amendments to S. 1841 which are under consideration by the Committee. These amendments would strike Titles III, IV, and V of the bill, which deal with intellectual property licensing, patent misuse, and increased protection to holders of U.S. process patents. They would also amend Title II of the bill, covering joint R&D, in several ways.

While we continue to believe that Titles III, IV, and V are desirable and should eventually be enacted, we recognize that it may be best at this time to proceed directly with Title II. Accordingly, in the interest of speedy enactment of the joint R&D legislation, we concur in this amendment.

The several amendments to Title II in our view do not change its basic approach. We have examined them and have no objections.

The original version of Title II, and as it would be changed by the amendments under consideration by the Committee, is a balanced approach to providing the necessary increased incentives for joint R&D. We believe it is far superior to other legislative proposals introduced on joint R&D.

Mr. Chairman, this concludes my testimony. I will be pleased to answer any questions.

The CHAIRMAN. Mr. McGrath, I have a few questions. After I ask a question, you can answer it. Then, if Dr. Merrifield cares to answer it also, I want him to feel free to do that.

Questions have been raised, Mr. McGrath, regarding both the single damage provision and the award of attorneys fees to successful defendants, that we are studying today. As you know, the Export Trading Company Act passed by the Congress in 1982 contains similar provisions. That is the act I hold in my hand here.

In your opinion, is there anything to distinguish joint R&D legislation from the Export Trading Company Act regarding single damages and attorneys fees?

Mr. MCGRATH. I think the situations are rather comparable in a couple of respects. One is that each of these pieces of legislation is what I would call a surgical effort to assist this country in competing in world markets. Neither is a general change in the antitrust laws. Each piece of legislation is, I believe, carefully designed to deal with the very specific problem involved.

Second, in each case I do not think that the problem was that there was any perception that there was much anticompetitive behavior going on. I do not think there is a perception that there is or ever has been anticompetitive behavior of any breadth in joint research and development ventures or in export trading, for that matter. Each statute was, rather, designed to deal with concerns that antitrust counselors would see, based on the fact that there is so little law governing either area.

I think the other thing is that, as Dr. Merrifield has indicated, we are in a period where things change so rapidly, and the research and development and export trade areas are at the forefront of change. Thus, also in that way are these statutes comparable.

The CHAIRMAN. Dr. Merrifield, do you care to respond to that?

Dr. MERRIFIELD. No.

The CHAIRMAN. Mr. McGrath, questions have also been raised regarding what type of joint R&D activity S. 1841 would specifically exclude, as well as include. Do you have any suggestions as to how the bill could be more specific in its coverage?

Mr. **McGrath**. Senator, I think that it would trouble me if we made an effort to make it much more specific. There have been other bills that have suggested more specific ways to spell out what kind of ventures will be protected under the statute. I think the trouble is that research and development joint ventures can take many forms. They can involve companies that do or do not compete. They can involve many different kinds of research. They can involve very short time periods or very long time periods. They can involve single products or multiple products, and so on. I think, to the extent we spell out too much and too carefully what is included, we are likely to create a kind of artificial straightjacket on how research and development may be done, and to exclude from the statute many kinds of things that may be appropriate.

I think the point that things are changing so fast is key to this also. The kinds of companies that may want to collaborate today may be quite different from the companies that may want to collaborate next year or 5 years from now. I think we would make a mistake if we made the legislation too specific. It is very difficult to amend the antitrust laws. It has been done relatively rarely in our Nation's history. I think, as the Sherman and Clayton Acts are themselves, it is helpful to have antitrust amendments that are broad enough to permit our economic system to thrive.

The **Chairman**. Do you have any response to that?

Dr. **Merrifield**. I have just one further comment, Senator. We anticipate that collaborative efforts will occur with small companies, with large companies, with mixtures of small and large companies, with companies that are in various degrees of the same business, that are synergistic with each other, that have skills and resources that are complementary to each other. This is where it will really happen. These are not in any nature anticompetitive; they are procompetitive. They generate technology. Our patent laws require publication of information; they actually spur new technology, and provide a growing data base that is necessary for additional effort. I think that is an important point.

The **Chairman**. Mr. McGrath, the antitrust section of the American Bar Association recently submitted a report to the Judiciary Committee on S. 1841. While endorsing title 2 in general, the section recommended that the disclosure program be eliminated. Specifically, the section felt disclosure was unnecessary to protect third parties, would deter companies from taking advantage of the bill, was unduly complex, and could give rise to negative inferences regarding ventures that did not utilize the disclosure provisions.

How would you respond to these arguments?

Mr. **McGrath**. Mr. Chairman, I think on balance that the disclosure provisions are a good idea. They are not particularly complicated. All that has to be done is relatively straightforward filing. I think that filing serves a useful purpose because at least it puts the joint ventures on notice that their joint venture may trigger some investigation or some notice in the antitrust enforcement agencies. The fact of the joint venture will be available to the antitrust enforcement agencies if they are investigating the industry or investigating the joint venturers. The publication of the joint venture will be available to other companies in the industry, and that can trigger whatever kinds of complaint or investigation that may be appropriate by them. So, I do not think it is particularly burdensome. I think it does serve a useful purpose.

I rather doubt it will deter companies from taking advantage of the legislation because of the confidentiality provisions that have been included in the proposed amendments.

Finally, as far as a negative inference is concerned, I suppose the concern is that if a joint venture has not been disclosed under this statute, a court may somehow by negative inference believe that some stricter standard should be applied to it. I think, if that is a concern, that it could certainly be dealt with in the committee's report. I would not think that is anybody's intention here.

So, I think, on balance—and that is what we are talking about here, a balanced legislative approach, that the notification provision makes good sense.

The **CHAIRMAN**. Dr. Merrifield, do you have any statement?

Dr. **MERRIFIELD**. No. I concur with that opinion.

The **CHAIRMAN**. Mr. McGrath, Mr. Rodino, in section five of his bill, provides that the court shall, at the conclusion of the action award to any party a reasonable attorneys fee for any phase of the litigation of such claim as to which a party substantially prevails.

The bill the administration recommended, with my amendment provides that the judge may award attorneys fees. Mr. Rodino's bill provides it shall be done. Which of these approaches do you prefer?

Mr. **MCGRATH**. Mr. Chairman, if there is to be a provision in the bill for the award of attorneys fees to defendants, I would prefer the amendment that you have proposed. Under that amendment the court may award such attorneys fees unless the court finds that the award is unjust in the circumstances. I think that kind of flexibility is preferable.

The **CHAIRMAN**. In other words, my amendment provides that the court may do it. It does not mandate it.

Mr. **MCGRATH**. That is correct.

The **CHAIRMAN**. Mr. Rodino's bill mandates attorneys fees, I believe.

Mr. **MCGRATH**. Yes, I believe it does.

The **CHAIRMAN**. And you would prefer the amendment that I offered to the bill rather than the provision in Mr. Rodino's bill?

Mr. **MCGRATH**. Yes.

The **CHAIRMAN**. On that particular point.

Mr. **MCGRATH**. On that particular point, yes.

The administration's bill did not have a provision permitting the award of attorneys fees to defendants, but we would not object to a discretionary provision of this sort in the final statute.

Senator **METZENBAUM**. Could both Mr. McGrath and the chairman explain something to me? I thought I had in my hand the chairman's amendment. And if I do, if it is this document here, it reads that the court shall award to the person or persons against whom the claim is brought the costs attributable to defending against the claim, including reasonable attorneys fee, unless the court finds that all or part of such an award is just in the circumstances.

Am I reading the wrong thing?

The CHAIRMAN. That is correct. It has that protection. Unless the court finds that all or part of such an award is unjust in the circumstances——

Senator METZENBAUM. It provides that it shall be done?

The CHAIRMAN. In other words, the court does not have to award attorneys fees. It has discretion. If the Senator has some preferred language, I think we can get together on the wording.

Senator METZENBAUM. No, no. I prefer the wording as zip, zero, no wording.

The CHAIRMAN. We can follow Mr. Rodino's language if you want to: "award any party reasonable attorneys fees." Our language would leave it in the discretion of the court.

I think that covers the questions I have at the moment. Senator, you may proceed.

Senator METZENBAUM. Dr. Merrifield, I am not going to ask you any questions because I am not in basic disagreement with you. You say you think we need this legislation. I say I think we need this legislation. The question is, What does the legislation look like when we get it? So, my questions really get down to the legal aspect of it. They relate more to Mr. McGrath.

Having said that, I would like to point out that in the export bill that was passed, the Export Trading Company bill, you had to get a certificate of review. It had to be determined in advance that the activities would not result in a substantial lessening of competition or restraint of trade within the United States nor a substantial restraint of the export trade of any competitor of the applicant, would not unreasonably enhance, stabilize or depress prices within the United States, and it would not constitute unfair methods of competition against competitors, and would not include any act that may reasonably be expected to result in the sale for consumption or resale within the United States of the goods that are being exported. Under that act, you had to go to the Secretary of Commerce. The Secretary of Commerce had to come to you. Then, if the Secretary, with the concurrence of the Attorney General, determines that such standards are met—there is nothing like that in this proposal, is there, Mr. McGrath?

Mr. MCGRATH. No, there is not, Senator, but I think the two situations are quite different in this sense. An export trading company is a joint venture which does a good deal more than research and development. It does the whole international marketing, pricing, and so on. Therefore, it is a much broader type of vehicle. What we are talking about here is only a research and development joint venture.

The concern is, at least my concern is that, if we required companies to actually get some kind of clearance before they would obtain the protections of this statute, that it would be much less likely that companies would avail themselves of the statute.

Senator METZENBAUM. Why?

Mr. MCGRATH. It would be much less likely because it would be much costlier. They would have to make a justification to the agencies as to why the thing they were doing was appropriate. Since many of these ventures would involve very technical things, those explanations frequently could be complicated and difficult to make.

Senator Metzenbaum. You are not suggesting to me, are you, that Control Data and IBM and some of the other major companies that are really the major proponents of this legislation—at least on the face of it they are—you are not suggesting that the costs of their attorneys fees to make that submission to the Attorney General would preclude them from moving forward? They have spent twice that much or three times that much on lobbying activities so far, and that has not slowed them down.

Mr. McGrath. I am not worried about those companies, Senator. I think it is a demonstrated fact that the bulk of the important research and development advances in this country over the last several decades have not been made by the IBM's of this world; they have been made by middle-size and smaller companies. That has really been the creative genius in this country, the middle-size and smaller companies.

Senator Metzenbaum. I agree.

Mr. McGrath. That is where we really need to foster the R&D.

Senator Metzenbaum. Let me ask this. The administration bill does not do anything about attorneys fees, as I recollect, am I right?

Mr. McGrath. That is correct, except obviously the plaintiffs would still be——

Senator Metzenbaum. Yes.

Mr. McGrath. Yes.

Senator Metzenbaum. Tell me why we cannot take the attorneys provision out of this bill, if it provides better assurance that the bill can move forward. Is not that a fair price to pay, since you do not have it now, since the proponents are not insisting upon it, since—I do not know where the idea came from, but if it would ensure the more rapid passage of this legislation, would it not be advisable to take the attorneys fees provision out?

Mr. McGrath. Let me say this about that. This answer may go in two directions, because obviously this was not something that we originally advocated, but it is not something we object to. The advantage of having it in is this. There have been situations where the risks of frivolous lawsuits have deterred conduct. I do not have any doubt about that. The risk of antitrust suits is not the risk of ultimate remedy only or the risk of bad publicity. It is also the risk of the cost. Unfortunately, the attorneys fees are thought to be the biggest part of that cost, and frequently are. Thus, having this kind of provision, which gives the court the discretion to provide that the defendant's attorneys fees would have to be paid, assists in limiting the risk that a company, thinking about a research and development venture that would be procompetitive, would face. It reduces the likelihood that the company forgo that opportunity because of the concern with this kind of cost.

On the other hand, it is certainly true that eliminating treble damages and making it clear that the rule of reason would apply will deter to some extent the risk of frivolous lawsuits. Obviously, those are the two most important things as far as we are concerned.

That may seem like kind of a waffling answer, and it is in the sense that we could live with it either way.

Senator **Metzenbaum**. But my basic question is this. You say the legislation is needed, Mr. Merrifield says it is needed. I support it, although there are very profound legal scholars who say that you can have this joint R&D under the present law; and, as long as you do not affect competition, you are not violating any laws and there are not any real risks.

Putting that aside for the moment, excepting for the moment that the legislation is desirable, the general thrust, if the legislation could move that much more rapidly or its passage might be better assured, do not you think it would be a reasonable price to pay to drop out the award of attorneys fees as against plaintiffs?

Mr. **McGrath**. I cannot make that legislative judgment, Senator. I know that there is a good deal of support for this particular provision by people whose concern is that, if it is not included, the bill might not do enough to encourage procompetitive research and development ventures. Obviously, we would like to see the legislation passed and passed promptly.

I would like to make one other comment. It may be that legal scholars believe that research and development joint ventures will be treated reasonably in the courts. I am not a legal scholar, but I tend to agree with that conclusion. The trouble is, in the real world, where we nonlegal scholars give advice, the current state of the law is very troubling and affects the way people in the real world do business.

Senator **Metzenbaum**. Your predecessor openly called for the wholesale elimination of treble damages from most antitrust violations. What is your position on that?

Mr. **McGrath**. My position is that we should not have wholesale detrebling, in particular in per se areas, and in particular in price fixing or horizontal market allocation. At least unless somebody gave me some evidence I am not aware of, I think the treble damages provision is a very healthy deterrent and a very necessary deterrent, along with the threat of criminal prosecution, which we have been trying very hard to make an even more credible threat.

I would really like to see us have a kind of recess in consideration of any kind of change in the detrebling area until, for instance, we take a look at the empirical results that we will get from the Georgetown University study that I mentioned before. I do not know what that study will show. There was a recent report done for the House Judiciary Committee which indicated that people's perceptions of what treble damages do are all over the lot. I think that the empirical study may surprise us all.

I think we ought to wait until we see that to consider any more detrebling of any broad nature. However, as I said before, I think this statute is really a surgical effort to do one particular thing which has broad support. I do not think that, to the extent we are concerned about some broad change in the antitrust laws, that should handicap us in trying to do a very specific thing which we are all in broad agreement should be done. At least that is my view.

Senator **Metzenbaum**. Do you think if the United States brings an action under this legislation and loses, that it ought to be required to pay the defendant's attorneys fees?

Mr. McGrath. No. I am generally opposed to the idea of the United States having to pay attorneys fees, except to the extent the Equal Access to Justice Act provisions would be kicked into place. Now, obviously, under that statute, to the extent that those provisions are kicked into place, then I think it should be, regardless of this legislation.

Senator Metzenbaum. Well, as you read this legislation, do you find any exception for the United States being assessed attorneys fees?

Mr. McGrath. I would say that, unless in the statute it is specifically indicated that the United States also is required to pay attorneys fees, under the applicable cases, its the interpretation would be that the United States is not to pay attorneys fees. That is subject to some legal disagreement, I realize.

Senator Metzenbaum. If the United States does not have to pay the attorneys fees, why should some small little local operator who thinks he is being squeezed out by this joint R&D effort and who really needs the protection of the antitrust laws, why should he be forced into bankruptcy or told that he better not file the lawsuit because he might be forced into bankruptcy as a consequence thereof?

Mr. McGrath. It is because of that kind of case that I answered the question that the chairman asked me before the way I did. I am not enthused about a provision that would make the award of attorneys fees to a successful defendant mandatory. It is precisely because of the kind of unequal pocketbook type of case that you are raising that I think that a mandatory attorneys fee provision would be troublesome. That is why I would prefer one that gives the court discretion to avoid the kind of unjust result that you are referring to.

Senator Metzenbaum. Your predecessor, Mr. Baxter, stated that the extent to which the antitrust laws interfere with research and development is vastly overstated. That was stated in The Wall Street Journal, June 29, 1983. And your current deputy, Mr. Ginsberg, wrote a lengthy article called "Antitrust Uncertainty and Technical Innovation," which makes a number of recommendations, but does not suggest abolishing treble damages.

How do you account for the fact that Mr. Ginsberg did not see fit to make a point of it in his article, Mr. Baxter came to a totally contrary conclusion, he did not think that they interfere with research and development? He said it was vastly overstated. I very seldom quote Mr. Baxter on anything but when he is right, I have no problem in quoting him.

Mr. McGrath. I think you will find, though, Senator, that Mr. Baxter did support in testimony the single damage provision of this legislation and did both testify and write an article indicating that the problem that I pointed out, that is the real world problem that exists because of the current law, is a significant one.

As far as Mr. Ginsberg's article is concerned, I have not considered it in this context. I can assure you that he supports this legislation today but——

Senator Metzenbaum. He better.

Mr. McGrath. On that I cannot testify.

Senator Metzenbaum. Section 9 of the Small Business Act allows the Attorney General and the SBA to grant antitrust exemptions to small businesses participating in research joint ventures. I am informed that, since that legislation has been in effect, only one exemption has ever been approved. Does not this really suggest that antitrust liability is not a major concern of joint venturers?

I might ask you in that connection, is it not the fact that the R&D in the technological field with Control Data and IBM and some of the others who have been most notable in pushing this legislation, is it not the fact that they are proceeding forward at the present time without any legislation being enacted?

Mr. McGrath. First of all, on the latter point, I would assume that many larger companies are proceeding ahead with joint research and development ventures of many kinds. I do not have any kind of feeling as to how broad that is, because it is rather rare that research and development joint ventures are made particularly public unless some kind of accomplishment is made. But the fact that there are many research and development joint ventures going forward today does not indicate that there are not many procompetitive ones being deterred. And that really is the problem.

Frankly, I am more concerned that these ventures are being deterred among smaller companies than the IBM's of this world.

Now, as far as the Small Business Administration Act, it is true, I believe, that only one has been approved under the provisions of that act. I do not know what conclusions, if any, can be drawn from that. That act, of course, only applies to companies below a certain size. In addition, it does require some affirmative steps, and I do not know to what extent that has deterred action.

So, really, I do not know how to draw any conclusions from the fact that we have only approved, I believe, one. I think one is correct.

Senator Metzenbaum. Thank you, Mr. Chairman.

The Chairman. Are there any more questions?

Again, I want to compare the Rodino bill with ours on the matter of attorneys fees. They both provide for attorneys fees, but in the Rodino bill the award of attorneys fees appears to be mandatory. In this bill it appears to be left to the court.

Mr. McGrath. Yes, Mr. Chairman, that is correct. I believe that this approach is vastly preferable, that your approach is vastly preferable.

The Chairman. With regard to single damages, both bills provide for single damages.

Mr. McGrath. That is correct.

The Chairman. The Rodino bill and the bill that I have introduced here so provide.

Mr. McGrath. Yes, Mr. Chairman.

The Chairman. I think those are all the questions. Thank you very much for your presence and your testimony. Thank you both.

Mr. McGrath. Thank you.

Dr. Merrifield. Thank you.

The Chairman. Our next witnesses are a panel consisting of Senator Tydings, the Honorable William M. Leech, Jr., Ms. Eleanor Fox, and Mr. Jay Angoff.

We have a good many witnesses here. I just think if maybe we could give you 7 minutes to present your views, we will put your whole statement in the record and give you 7 minutes to summarize it. Then questions will be propounded by the distinguished Senator from Ohio and myself. Is that agreeable to you?

Mr. TYDINGS. Do you mean 7 minutes apiece or 7 minutes for the entire panel, Mr. Chairman?

The CHAIRMAN. I mean 7 minutes apiece, if you want that much.

Mr. TYDINGS. Thank you.

The CHAIRMAN. If you can do it in 5 minutes, is that agreeable? It will be 5 minutes apiece, and we will put your whole statement in the record and then ask you questions. Is that agreeable to you, Senator?

Mr. TYDINGS. Yes.

The CHAIRMAN. All right, you will have 5 minutes each.

I believe we will take you first. You were formerly a U.S. Senator and a valuable member of this committee.

STATEMENTS OF A PANEL CONSISTING OF JOSEPH D. TYDINGS, FORMER U.S. SENATOR; THE HONORABLE WILLIAM M. LEECH, JR., ATTORNEY GENERAL AND REPORTER, STATE OF TENNESSEE, AND CHAIRMAN, ANTITRUST COMMITTEE, THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL; ELEANOR M. FOX, PROFESSOR OF LAW, NEW YORK UNIVERSITY SCHOOL OF LAW; AND JAY ANGOFF, PUBLIC CITIZEN CONGRESS WATCH

Mr. TYDINGS. Thank you, Mr. Chairman. I have a prepared statement which I offer on behalf of myself and Harold Kohn, Esq., who is an outstanding attorney in the antitrust field.

Mr. Chairman, as you know, I served on this committee from 1965 through 1971. I will ask that our statement be put in the record in its entirety.

The CHAIRMAN. Without objection, that will be done.

Mr. TYDINGS. I would also like to suggest, Mr. Chairman, that, in the Antitrust and Trade Regulation reporter of March 1, volume 46, there is some interesting data on this general area, including a rather detailed report from a consultant to the House Judiciary Committee with respect to treble damage remedies. That report was prepared by Prof. George E. Garvey, associate professor of Law, The Catholic University of America. I would suggest that this would be a valuable part of the appendix of this record because it deals with some of the areas affected by your legislation.

The CHAIRMAN. We could hold it on file with the committee and make it available.

Mr. TYDINGS. Thank you.

Mr. Chairman, I speak as an officer of the court and not as a member of a very large law firm in this country. Mr. Kohn is a member of the firm of Kohn, Savett, Marion & Graf, with offices in Washington and Philadelphia. As the chairman knows, from time to time Mr. Kohn and I have appeared to testify before this committee on matters which we feel relate to the basic philosophy of the antitrust laws of the United States. We have both sought to avoid a parochial approach. As a matter of fact, when a great many of the plaintiff's bar, including a number of the attorneys general, proposed legislation which would have reversed the Supreme Court's *Illinois Brick* decision, both Mr. Kohn and I opposed the position of the majority of the plaintiff's bar and opposed attempts to legislatively overturn *Illinois Brick*.

On the other hand, Mr. Chairman, I think you know from our appearances when S. 995 was before this committee that both Mr. Kohn and I feel very strongly with respect to any legislation which we feel would undermine the basic philosophy which is behind Senator Sherman's antitrust legislation, enacted in the late 1890's and behind the Clayton Antitrust Act.

We do not appear here, and we do not wish to make a statement with respect to the pros and cons of an exemption with respect to research and development. That is uniquely a responsibility of the Congress.

We do appear here, Mr. Chairman, to strongly and vigorously oppose the provisions within your proposed legislation which would limit treble damages under the Sherman and Clayton Acts and which would provide for the payment of counsel fees by plaintiff's attorneys in the event they lost a motion or lost a case. We think that this would be a fundamental error, Mr. Chairman.

We think that in prior pieces of legislation, which may or may not have had merit, the efforts by some groups in this country to basically weaken the antitrust laws and overreach have resulted in the failure of the legislation in its entirety. I can only refer to S. 995 last year, which the chairman realizes, I think, failed when the proponents of legislation designed to make changes in the law of contribution attempted to make those changes retroactive. I think by the same token, Mr. Chairman, if your object is to encourage research and development in this country, and if indeed the antitrust laws deter that effort—and I think there are tremendous differences of opinion on that supposition, then I believe some of Chairman Rodino's comments in the House would be worth noting. Indeed if the promotion of research and development is the objective of this legislation, then I do not think you should tamper with that objective by weakening the treble damages in the antitrust area or by introducing the issue of attorneys fees against failing plaintiffs.

As the chairman knows, the major developments in tort law within the free world have basically taken place in this country. The reason a poor plaintiff in England, France, or Germany, or Italy, or in most of the Western World, except the United States, cannot recover in a severe airplane crash or in most other, accidents—an office fire, a product design failure—is because their systems of jurisprudence provides that a defendant can assess damages and attorneys fees against a losing plaintiff and thus make a tort recovery against a strong and affluent defendant a practical impossibility.

I must say, Mr. Chairman, that, if the proponents of the Clayton Act and the Sherman Act were here today, they would make the same arguments with respect to the question of attorneys fees and the same arguments to try and encourage the wronged antitrust plaintiffs today that they did in the 1890's and in 1912, 1913, and 1914. I think, that to enact these provisions into legislation, the provision with respect to assessing attorneys fees against plaintiffs, will chill the enforcement of the antitrust laws. Mr. Chairman, the private enforcement of the antitrust laws with trebled damage recovery is imperative if we are to have meaningful antitrust laws in this country.

With respect to treble damages, I think if you let the nose of the camel get under the tent with respect to the enforcement of antitrust in this country by weakening treble damages, then you have delivered a severe blow to the entire system of free enterprise and laws against monpolies and anticompetitive practices in the United States. Once you open that tent, you are going to have a flow of special interests They are going to pound on your door, Mr. Chairman. They are going to pound on your door for an exemption or this group or that group or this set of circumstances or that set of circumstances. The basic arguments and philosophies of the Sherman Act and the Clayton Act have stood this country well over a period now almost approaching a century.

I think that it would be a mistake to insist upon the inclusion of the single damages and the counsel fees provisions set forth in this legislation.

That is my basic point, Mr. Chairman.

[Prepared statement follows:]

PREPARED STATEMENT OF
JOSEPH D. TYDINGS
AND
HAROLD E. KOHN
IN OPPOSITION TO PROVISIONS OF S.1841 WITH RESPECT TO ELIMINATION OF TREBLE DAMAGES AND ATTORNEYS' FEES, SECTIONS 203 AND 205

I am making this statement on behalf of myself and Harold Kohn, Esq. As the members of your Committee will recall, Harold Kohn, Esq. of the Philadelphia Bar and I have both testified before the Committee on several occasions with respect to pending antitrust legislation. I served as a member of this Committee from 1965 through 1971.

I am a member of the law firm of Finley, Kumble, Wagner, Heine, Underberg, Manley & Casey, which is one of the largest national law firms in the country, and which represents both plaintiffs and defendants, generally and in antitrust matters as well. Mr. Kohn is a member of the firm of Kohn, Savett, Marion & Graf, P.C., with offices in Washington and Philadelphia. This firm likewise represents both plaintiffs and defendants in antitrust and other litigation, although it is more active in the representation of plaintiffs.

About two years ago we appeared in opposition to S.995 of the Ninety-Seventh Congress. See "Hearings Before the Committee on the Judiciary, United States Senate, Ninety-Seventh Congress, First and Second Sessions", pages 96, 353 _et_. _seq_., 374 _et_. _seq_., 539, 615.

As the record will confirm, both Mr. Kohn and I have sought to avoid a parochial approach to antitrust legislation. We have endeavored in our prior appearances before the Committee to advocate that which we believe best advances the basic purpose of the antitrust laws, to preserve and strengthen competition. For example, contrary to the position taken by many plaintiff lawyers, we strongly opposed legislation which would have reversed the Illinois Brick decision of the United States Supreme Court. See, e.g., transcript of June 1983 hearings on S.915.

Our purpose in appearing before your committee is not to imply either our support for or opposition to any other aspect of the proposed legislation before you exempting joint research and development from the antitrust laws. We are here to strenuously oppose, at this time, those provisions of the Bill which

(a) repeal the long standing treble damage provisions of the antitrust laws, and (b) impose for the first time an obligation upon unsuccessful plaintiffs to pay defendants' counsel fees.

We state here briefly, in summary form, the reasons for these objections.

1. The provisions for the limitation of treble damages under the Clayton Act (Sec. 203) and for payment of counsel fees by plaintiffs (Sec. 205) repeal and amend laws which have been in effect for generations, and nobody has shown any need for such changes. Many prior efforts to enact similar provisions during the past few years have been rejected by Congress. Whatever need may be urged for the exemption of joint research and development from the antitrust laws, no need has been demonstrated for exempting conspirators whose conduct is found not to be protected by that exemption, from the obligation of all other antitrust violators to pay treble damages. To enact such law is to invite anti-competitive practices.

There is no reason why such defendants should be given a right enjoyed by no other antitrust defendants, to collect counsel fees from plaintiffs. This would have a chilling effect on private antitrust litigation, which litigation is a most effective procedure for enforcement of antitrust legislation.

Defendants do not need it.

As was demonstrated in the prolonged hearings on contribution legislation, antitrust defendants, generally among the largest, wealthiest and most powerful corporations in the nation, indeed, in the world, have been able to cope without much difficulty with antitrust litigation under existing procedures. They have not been put out of business. They have generally emerged, as in the case of the Electrical Equipment Antitrust Litigation in the 1960's, and the Forest Industry cases in the 1970's and 1980's, stronger and wealthier than they were before suit. This litigation, the Gypsum cases, the Plywood cases, and the Corrugated Container cases caused them to examine their business practices more carefully, and to discard those which had been uneconomic and inefficient but continued because illegal conspiracies in restraint of trade if undetected are frequently very profitable.

2. Congress has recently passed other exemption legislation, S.47, the Ocean Shipping Act of 1983, which contains no such limitations on recovery and does not impose counsel fees on plaintiffs.

3. The insistence upon the inclusion of single damage and counsel fee provisions may prevent passage of R & D legislation in its entirety. Such overreaching is precisely what made it possible to enact the antitrust contributions and claims limitation Bills proposed by substantially the same interests in 1981 and 1982. The proponents of that legislation sought to make contribution in antitrust damage situations retroactive, a provision so egregious that it galvanized opposition to the Bills in their entirety, and the legislation was never enacted. The ocean shippers, profiting from this history, have been more reasonable and moderate in their demands and focused on their basic problem. They appear to have been successful.

4. To include these provisions in S.1841 will inevitably engulf Congress in demands for the elimination of treble damages and imposition of counsel fees on plaintiffs in all antitrust areas, which is synonymous with ending private antitrust enforcement. Congress will be swamped by proposed Bills by every pressure group, by major corporations, by their

supporters in the Round Table, and by everyone else seeking to restrain rather than encourage competition. Congress would be well advised to avoid such an onslaught of special interests. That camel must not be permitted to get its nose under the tent.

Accordingly, we urge the elimination of Sections 203 and 205 from S.1841, to avoid a prolonged and bitter legislative fight in both Houses of the Congress over proposals which are inimical to the public interest, which are at variance with the history of effective enforcement of antitrust laws, and particularly so today when competition is being threatened by mergers of the world's largest corporations in cartelized industries.

The CHAIRMAN. We will now hear from Mr. Leech.

Mr. LEECH. Mr. Chairman, distinguished members of the committee, I do appreciate the opportunity to appear here before you and submit some comments on the views of the National Association of Attorneys General to the extent that we have formulated views, and those of my office in Tennessee being charged with enforcement of antitrust laws.

I would ask that my written statement be made a part of this record, Mr. Chairman.

The CHAIRMAN. Without objection, your entire statement will be put in the record. You may summarize it.

TESTIMONY OF HON. WILLIAM M. LEECH, JR.

Mr. LEECH. Thank you, Mr. Chairman. I would also ask that on page 4 of that statement, on line 11, at the beginning of the first sentence, that a correction be made. After the word the, after it says third, the, before damage, it should be interest on that should be inserted in there.

The CHAIRMAN. Without objection, that change will be made.

Mr. LEECH. As you are aware, Mr. Chairman and distinguished members of this committee, the attorneys general are actively involved in enforcement of Federal antitrust laws which are applicable to joint ventures. As you are aware also, under the Hart-Scott-Rodino Antitrust Improvement Act, the State attorneys general were statutorily authorized to represent the claims of their natural citizens within the Federal courts. In addition to that statutory authorization, the Supreme Court of the United States has, of course, permitted actions by the States.

So whether or not a particular joint venture or problem is posed as a Sherman Act or Clayton Act violation, in our view the States do have ample legal basis upon which to challenge any joint venture agreement at the present time under Federal antitrust laws.

Our understanding of the National Productivity and Innovation Act, which is before this committee, would amend the Clayton Act in several respects. First, it would eliminate treble damages.

Second, this act may allow a successful antitrust defendant in a joint-venture case arising under the act to be awarded litgation costs and attorneys fees. Third, the interest on the damage period is severely limited to the time period of litigation for certain joint ventures. Fourth, the filings with the Department of Justice and/or the Federal Trade Commission would, in effect, in our opinion, immunize the joint venture from any private or State civil action.

It is our opinion that these provisions may go too far to correct what is perceived to be a problem in the area of antitrust litigation involving joint ventures for research and development.

The States first request of the committee is additional time in which to consider this act and its probable impact on the States. It is particularly true in light of an amendment which I have only seen as of this morning, a few hours ago, which virtually would preempt State action in this entire area.

As chairman of the antitrust committee since December of 1983, I have had a very limited time in which to review the bill and have adequate opportunity to discuss it with our colleagues in the antitrust committee.

Senator METZENBAUM. Mr. Leech, let me interrupt you. You have asked for more time. You indicate you have not had a chance to examine the new proposal that Congressman Rodino as well as the chairman have come up with.

Mr. LEECH. That is right.

Senator METZENBAUM. Understandably, there are those on the committee who are anxious to move the legislation forward. I do not happen to be part of that particular group, but I am willing to move the legislation forward very rapidly if they take out some of these controversial sections.

My question to you, however, is——

The CHAIRMAN. Senator, is he through? Why do you not let him finish his statement?

Senator METZENBAUM. I just want to ask him how much time. How much time do you think you would need, 2 weeks, a month?

Mr. LEECH. We have our next regular meeting in which the antitrust committee of NAAG, together with the entire national association, in June.

Senator METZENBAUM. Could you accelerate?

Mr. LEECH. We could expedite it if we were given an opportunity. In the past, as you know, the State attorneys general in the States have been very active. Our advice has been sought in commenting on the Federal legislation.

Senator METZENBAUM. It might be helpful, Mr. Leech, if you let each member of the committee know, or the attorneys general of the States, let them know of their feeling. I know the chairman is anxious to move the measure this coming Thursday. I think that might have a bearing upon the thinking of some of the committee members.

Mr. LEECH. That was, Senator, our reason for our first request being additional time in which to consider it. Certainly the association will expedite their consideration.

Senator METZENBAUM. Thank you.

Mr. LEECH. But in the past the States input has been sought.

Senator METZENBAUM. Please proceed.

Mr. LEECH. We would like to do so this time.

The CHAIRMAN. You have taken a little of his time. I am going to give him a couple more minutes.

Mr. LEECH. Thank you, Mr. Chairman.

In our judgment, the presence of treble damages provides not only an incentive for the private sector but also is a measure of deterrence to anticompetitive ventures. Some form of antitrust immunity or protection may be desirable within the subject area which we are discussing in order to stimulate innovation. However, it is simply our opinion that the present form does not address it. The protection, we think, can be accomplished without any award of de facto immunity. We also note that joint ventures could produce or raise——

The CHAIRMAN. Mr. Leech, are you reading from your statement?

Mr. LEECH. Just notes on the side, Mr. Chairman.

The CHAIRMAN. I see. I was under the impression you are going to summarize it as Senator Tydings did.

Mr. LEECH. That is what I am attempting to do. I am skipping large portions of it and emphasizing portions of it by referring to my notes, but I am not reading it all in its entirety.

As a general proposition, we question whether there is a demonstrable basis upon which to find that joint ventures have been eliminated or substantially reduced by antitrust laws involving treble damages. We also would like to refer to this Garvey report which Senator Tydings referred to. We think there is some interesting information in that Garvey report which could be most helpful.

In our judgment, the lack of significant reported and litigated cases involving joint ventures strongly suggest that treble damage provisions have really not had a demonstrable adverse effect. We are unaware of any empirical studies which clearly establish that those treble damage provisions have in any way had a chilling effect. Moreover, and I think of great significance, we submit that the present governmental procedures employed by the Department of Justice and the Federal Trade Commission, in seeking business review procedures is adequate in order for potential joint venturers to submit a proposal to those agencies and have action on those requests returned. We think it has worked in the past, does work now, and can and should work in the future without any damage done to the treble damage or attorneys fees provisions.

Mr. Chairman, we would just simply say that, if the legislation is necessary, we would prefer a procedure which would give some form of protection only to those firms which received favorable business review letters from the Department of Justice or the FTC or a State agency. In essence, we are asking that we be included in the procedure rather than preempted or excluded, since the States do play a very instrumental role.

The CHAIRMAN. There is some question here about the time. Similar bills have been here before the committee for several years. Senator Mathias had a bill last year, and this bill has been pending for several weeks. If the attorneys general had any statement to make, I am wondering why they have not done it before now.

Mr. LEECH. I had understood we had. I am not prepared to speak for all of them. I have been chairman of the antitrust committee since December. The committee was kind enough to invite me this time.

The CHAIRMAN. The point is that people can keep coming up and saying they did not know about it or have not had enough time. That is the usual excuse to put things off.

Senator METZENBAUM. I do not think, Mr. Chairman, I ever heard——

The CHAIRMAN. Just a minute, I am talking now.

Senator METZENBAUM. Good.

The CHAIRMAN. Senator Mathias had a bill last year. Anybody could have expressed themselves. We have got this bill here. The bill has been considered here off and on for several years. So, it seems to me that, to come up here now just when we are having this hearing, and want to put it off further is really not a good excuse.

If you want to get in touch with your attorneys general between now and Thursday, you have got ample time to do it anyway. They can express themselves by then. Today is Monday. You can send a wire to them, and you would probably hear from them tomorrow or the next day; would you not?

Mr. LEECH. Mr. Chairman, we usually have been consulted on legislation proposed in Congress, the States have, and through their attorneys general. This is the first opportunity from the committee that we have had to appear in hearings.

The CHAIRMAN. Senator?

Senator METZENBAUM. I was just going to say that I do not think there ever was an opportunity for them or any of the other opponents of this legislation to be heard. I think I am correct in that. I will ask the staff.

The CHAIRMAN. Senator Mathias had a bill last year.

Senator METZENBAUM. But even that, I do not think we ever heard the opponents.

The CHAIRMAN. We have held hearings on this very bill before this, Senator. And we have on Senator Mathias' bill.

Senator METZENBAUM. I think we only heard the Federal Government witnesses in connection with the administration proposal, although there could have been a hearing when I was not present; but I did not think so.

The CHAIRMAN. I think the time has to come when the Senate has to act. You just cannot put off and put off and grant everybody's excuse for another put-off. There is too much of that going on around here. I think the people through their Senators have a right to some action.

[Prepared statement of Hon. William M. Leech, Jr., follows:]

TESTIMONY OF THE HONORABLE WILLIAM M. LEECH, JR., ATTORNEY GENERAL AND REPORTER, STATE OF TENNESSEE AND CHAIRMAN, ANTITRUST COMMITTEE, OF THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

I APPRECIATE THE OPPORTUNITY TO APPEAR HERE TO COMMENT ON THE STATES' VIEWS ON "THE NATIONAL PRODUCTIVITY AND INNOVATION ACT OF 1983" THAT WILL ALTER EXISTING ANTITRUST STATUTES AND PRINCIPLES IN THE AREA OF JOINT VENTURES FOR RESEARCH AND DEVELOPMENT IN THE PRIVATE SECTOR. MY REMARKS TODAY ARE IN A REPRESENTATIVE CAPACITY AS CHAIRMAN OF THE ANTITRUST COMMITTEE OF THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, AND AS TENNESSEE'S PRINCIPAL LAW ENFORCEMENT OFFICER IN ANTITRUST MATTERS. THE STATE ATTORNEYS GENERAL ARE ACTIVELY INVOLVED IN THE ENFORCEMENT OF THE FEDERAL ANTITRUST LAWS THAT ARE APPLICABLE TO JOINT VENTURES.

AS YOU ARE AWARE AND IS REFLECTED IN THE ACT, BY VIRTUE OF TITLE III OF THE HART-SCOTT-RODINO ANTITRUST IMPROVEMENTS ACT OF 1976[1], STATE ATTORNEYS GENERAL ARE AUTHORIZED TO REPRESENT

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[1] 15 U.S.C. §15c.

THE ANTITRUST CLAIMS OF THEIR NATURAL CITIZENS IN THE FEDERAL COURTS. THIS STATUTORY AUTHORIZATION ENABLES THE STATE ATTORNEYS GENERAL TO SUE ON BEHALF OF CONSUMERS FOR VIOLATIONS OF SECTIONS 1 AND 2 OF THE SHERMAN ACT UNDER WHICH AN ANTITRUST OFFENSE INVOLVING A JOINT VENTURE MAY LIE.[2]

IN ADDITION TO THIS CONGRESSIONAL AUTHORIZATION, THE UNITED STATES SUPREME COURT HAS PERMITTED ACTIONS BY STATES UNDER THE SHERMAN AND CLAYTON ACTS TO ENJOIN COMBINATIONS THAT ENGAGE IN ANTI-COMPETITIVE CONDUCT[3]. JOINT VENTURES HAVE BEEN HELD BY THE SUPREME COURT TO PRESENT CLAYTON ACT VIOLATIONS, IN ADDITION TO A SHERMAN ACT OFFENSE.[4] THUS, WHETHER THIS PARTICULAR JOINT VENTURE PROBLEM IS POSED AS A SHERMAN ACT

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[2] *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951).

[3] *Hawaii v. Standard Oil Co.*, 405 U.S. 651, (1972).

[4] *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158 (1964).

OR CLAYTON ACT VIOLATION, IN OUR VIEW, THE STATES HAVE AMPLE LEGAL BASES UPON WHICH TO CHALLENGE A JOINT VENTURE ARRANGEMENT UNDER THE FEDERAL ANTITRUST LAWS.

OUR UNDERSTANDING OF "THE NATIONAL PRODUCTIVITY AND INNOVATION ACT" BEFORE THIS COMMITTEE IS THAT THE CLAYTON ACT WOULD BE AMENDED IN SEVERAL RESPECTS AS TO JOINT VENTURES. FIRST, THIS ACT WOULD ELIMINATE THE AVAILABILITY OF TREBLE DAMAGES IN A FEDERAL ANTITRUST ACTION INVOLVING CERTAIN JOINT VENTURES THAT ARE ALLEGED TO VIOLATE THE FEDERAL ANTITRUST LAWS. SECOND, THIS ACT MAY ALLOW A SUCCESSFUL ANTITRUST DEFENDANT IN A JOINT VENTURE CASE ARISING UNDER THIS ACT TO BE AWARDED ATTORNEY'S FEES. THIRD, THE INTEREST ON THAT DAMAGE PERIOD IS SEVERELY LIMITED TO THE TIME PERIOD OF LITIGATION FOR CERTAIN JOINT VENTURES. FOURTH, FILINGS WITH THE DEPARTMENT OF JUSTICE AND/OR THE FEDERAL TRADE COMMISSION WILL, IN EFFECT, IMMUNIZE A JOINT VENTURE FROM A PRIVATE OR STATE CIVIL ACTION FOR TREBLE DAMAGES.

IN THE STATES' VIEW. THESE PROVISIONS MAY GO TOO FAR TO CORRECT A PERCEIVED PROBLEM IN THE AREA OF ANTITRUST LITIGATION INVOLVING JOINT VENTURES FOR RESEARCH AND DEVELOPMENT.

THE STATES' FIRST REQUEST OF THE COMMITTEE IS ADDITIONAL TIME TO CONSIDER THIS ACT AND ITS PROBABLE IMPACT UPON THE STATES. AS CHAIRMAN OF THE STATE'S ANTITRUST COMMITTEE SINCE DECEMBER, 1983, I HAVE HAD A VERY BRIEF TIME IN WHICH TO REVIEW THIS BILL AND HAVE NOT HAD AN ADEQUATE OPPORTUNITY TO SURVEY MY COLLEAGUES ON THE ANTITRUST COMMITTEE ON THIS BILL. THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL HAS PLAYED AN ACTIVE ROLE IN COMMENTING ON FEDERAL ANTITRUST LEGISLATION. I AM CERTAIN THAT MY COLLEAGUES WOULD APPRECIATE ADDITIONAL TIME TO REVIEW AND TO TAKE A POSITION ON THIS BILL. THE STATES WILL MEET IN JUNE OF THIS YEAR AND WOULD WELCOME THE OPPORTUNITY TO TAKE A FORMAL POSITION ON THIS LEGISLATION. IF GIVEN THE OPPORTUNITY, THE STATES WOULD EXPEDITE OUR REVIEW AND COMMENTS ON THIS BILL THAT WE DEEM OF SUBSTANTIAL IMPORTANCE TO THE STATES.

AS A GENERAL RULE, THE STATES HAVE LONG OPPOSED ANY LEGISLATIVE EFFORT TO WEAKEN THE FEDERAL ANTITRUST LAWS, PARTICULARLY BY THE ELIMINATION OF TREBLE DAMAGES. IN OUR JUDGMENT, THE PRESENCE OF TREBLE DAMAGES PROVIDES NOT ONLY INCENTIVE TO THE PRIVATE SECTOR TO ENFORCE THE FEDERAL ANTITRUST LAWS, BUT ALSO PROVIDES A MEASURE OF

DETERRENCE TO ANTICOMPETITIVE JOINT VENTURES. THIS ACT, IF PASSED, MAY WELL AFFORD A FORM OF DE FACTO IMMUNITY FROM THE FEDERAL ANTITRUST LAWS IN THE AREA OF JOINT VENTURES. SOME FORM OF ANTITRUST IMMUNITY OR PROTECTION MAY BE DESIRABLE IN THIS AREA TO STIMULATE INNOVATION IN OUR ECONOMY BY JOINT VENTURES FOR RESEARCH PURPOSES. HOWEVER, IN THE STATES' JUDGEMENT, THIS GOAL CAN BE ACCOMPLISHED WITHOUT THE AWARD OF SUCH DE FACTO IMMUNITY.

TO BE SURE, JOINT RESEARCH VENTURES, CAN HAVE ANTICOMPETITIVE EFFECTS. FIRST, JOINT RESEARCH LESSENS THE LEVEL OF EXISTING AND POTENTIAL COMPETITION BETWEEN THE PARTICIPATING FIRMS. SECOND, THE JOINT VENTURE AGREEMENT OR OTHER RELATED AGREEMENTS BETWEEN THE PARTIES MAY CONTAIN SPECIFIC RESTRICTIONS THAT RESTRAIN COMPETITION. IF THESE RESTRICTIONS ARE NOT LIMITED AS TO SCOPE AND DURATION, THEN THESE RESTRICTIONS MAY PRESENT MAJOR ANTITRUST CONCERNS. THIRD, LIMITATIONS ON ACCESS TO PARTICIPATION IN JOINT RESEARCH, OR TO THE FRUITS OF THAT RESEARCH, MAY PRESENT ANTITRUST PROBLEMS IF THE EFFECT OF THOSE LIMITATIONS IS GREAT OR PLACES MARKET POWER IN THE HANDS OF THE JOINT VENTURERS. WE ALSO NOTE THAT JOINT VENTURES MAY

PRODUCE OR RAISE ENTRY BARRIERS AND ELIMINATE POTENTIAL COMPETITORS FROM THE RELEVANT MARKET.

IN OUR EXPERIENCES[4], THIS TIME MAY BE THE AGE OF INFORMATION. INFORMATION AND RESEARCH MAY WELL BE THE NEW FRONTIER OF COMPETITION IN THE MARKETPLACE.

AS A GENERAL PROPOSITION, WE QUESTION WHETHER THERE IS A DEMONSTRABLE BASIS UPON WHICH TO FIND THAT JOINT VENTURES HAVE BEEN ELIMINATED OR SUBSTANTIALLY REDUCED BY REASON OF EXISTING ANTITRUST LAWS RELATIVE TO TREBLE DAMAGES. A RECENT CONSULTANT REPORT[5] TO THE HOUSE JUDICIARY COMMITTEE ON THE TREBLE DAMAGE REMEDIES IN THE ANTITRUST LAWS CITES A RECENT STUDY OF ANTITRUST LITIGAITON IN A MAJOR UNITED STATES DISTRICT COURT. SEVENTY-FIVE PERCENT OF THE ANTITRUST LITIGATION IN THAT COURT REPRESENTED *PER SE* OFFENSES OF THE ANTITRUST LAW, SUCH AS PRICE FIXING, HORIZONTAL MARKET ALLOCATIONS, BOYCOTTS, AND ILLEGAL TYING ARRANGEMENTS. JOINT VENTURE LITIGATION

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[4] *See, State of Tennessee ex rel. Leech v. United Technologies Corp.*, 1981-1 Trade Cases ¶64,075 (Davidson County Chancery Court 1981); *United States v. Western Electric Company, Inc. and American Telephone and Telegraph Company*, No. 82-0192 (United States District Court for the District of Columbia).

[5] George Garvey, "Report to the Committee of the Judiciary, United States House of Representatives" represented in 46 Antitrust and Trade Reg. Rep. 356 (March 1, 1984).

WAS NOT MENTIONED AS ONE OF THE PRINCIPAL AREAS OF ANTITRUST LITIGATION. OF ALL THE CASES THAT WERE BROUGHT IN THAT COURT, THE GARVEY REPORT INDICATES THAT EIGHTY-FOUR PERCENT WERE DISMISSED OR SETTLED PRIOR TO JUDGMENT. OF THOSE CASES THAT WENT TO JUDGMENT, ONLY FOUR RESULTED IN AWARDS FOR THE PLAINTIFF.

THE REPORTED CASE LAW, PARTICULARLY AT THE SUPREME COURT LEVEL, ON JOINT VENTURES, IS SUBSTANTIALLY LESS THAN THE LITIGATION INVOLVING OTHER AREAS OF THE ANTITRUST LAWS.

IN OUR JUDGMENT, THE PAUCITY OF REPORTED AND LITIGATED CASES INVOLVING JOINT VENTURES STRONGLY SUGGESTS THAT THE TREBLE DAMAGES PROVISION OF THE CLAYTON ACT HAS NOT HAD A DEMONSTRABLE ADVERSE IMPACT ON JOINT VENTURES FOR RESEARCH AND DEVELOPMENT. WE ARE UNAWARE OF ANY EMPIRICAL STUDIES THAT CLEARLY ESTABLISH ANY CHILLING EFFECT OF THE PRESENT ANTITRUST LAWS UPON JOINT RESEARCH AND DEVELOPMENT.

IN THE STATES' VIEW, THE AVAILABLE EMPIRICAL DATA DOES NOT ESTABLISH A COMPELLING FACTUAL RECORD TO WARRANT THIS SUBSTANTIAL STATUTORY CHANGE IN THE FEDERAL ANTITRUST LAWS.

MOREOVER, WE SUBMIT THAT EXISTING GOVERNMENTAL PROCEDURES MAY PROVIDE ADEQUATE PROTECTION TO LEGITIMATE JOINT VENTURES. THE DEPARTMENT OF JUSTICE AND THE FEDERAL TRADE COMMISSION, AS WELL AS SEVERAL STATES, INCLUDING TENNESSEE, HAVE A BUSINESS REVIEW PROCEDURE. THIS PROCEDURE ALLOWS PRIVATE FIRMS TO OBTAIN A STATEMENT OF ENFORCEMENT INTENTIONS OF THESE AGENCIES UNDER THE FEDERAL ANTITRUST LAWS AS TO A PROPOSED VENTURE. USE OF THIS PROCEDURE BY INTERESTED PERSONS, IN OUR JUDGMENT, CAN SERVE TO AVOID THE TYPE OF JOINT VENTURE AGREEMENT THAT WILL LIKELY PRESENT SUBSTANTIAL ANTITRUST PROBLEMS. IN OUR EXPERIENCES, WE ARE UNAWARE OF ANY PRIVATE OR STATE DAMAGE ACTION THAT INVOLVED CONDUCT AND FIRMS WHOSE ACTIONS HAD BEEN CLEARED, IN EFFECT, BY A DOJ OR FTC BUSINESS REVIEW LETTER.

IN THE STATES' VIEW, THIS ACT, AS NOW WORDED, IS UNLIKE THE

BUSINESS REVIEW PROCEDURE IN THAT IT GRANTS SUBSTANTIAL PROTECTION TO JOINT VENTURES MERELY UPON NOTIFICATION TO THE DEPARTMENT OF JUSTICE OR THE FEDERAL TRADE COMMISSION WITH SUPPORTING MATERIALS. IF LEGISLATION IS NECESSARY IN THIS AREA, THE STATES WOULD PREFER A PROCEDURE THAT WOULD GIVE SOME FORM OF PROTECTION ONLY TO THOSE FIRMS THAT RECEIVED A FAVORABLE BUSINESS REVIEW LETTER FROM DOJ OR THE FTC OR A STATE AGENCY.

IN RECENT TIMES, THE STATES HAVE DIFFERED SHARPLY WITH THE DEPARTMENT OF JUSTICE AND THE FTC ON ANTITRUST MATTERS. THE ACT, AS DRAFTED, PRESUMES THAT NOTICE OF THE JOINT VENTURE TO THE DEPARTMENT AND THE COMMISSION WILL INSURE THAT AN ANTICOMPETITIVE JOINT VENTURE IS NOT FULLY IMPLEMENTED. AS NOTED, IN RECENT TIMES, THE DEPARTMENT AND COMMISSION HAVE TAKEN ENFORCEMENT POSITIONS THAT IN THE STATES' VIEW, PERMIT ANTICOMPETITIVE CONDUCT. IN LIGHT OF THIS CONFLICT BETWEEN PUBLIC AGENCIES ON PROPER ANTITRUST ENFORCEMENT POLICY, PERHAPS UNRESTRICTED ACCESS FOR THE STATES TO THE MATERIALS FILED BY THE JOINT VENTURERS WITH THE JUSTICE DEPARTMENT AND THE COMMISSION WILL DECREASE THE LIKELIHOOD OF FULL IMPLEMENTAITON OF AN ANTICOMPETIVE JOINT VENTURE.

WE WOULD FURTHER PROPOSE FOR THE COMMITTEE'S CONSIDERATION, THE OBSERVATIONS OF SOME NOTED ANTITRUST EXPERTS IN THIS AREA AS TO CERTAIN JUDICIAL CONSTRAINTS ON JOINT VENTURES. WE RECOMMEND THAT IN EXCHANGE FOR ANY PREFERRED ANTITRUST STATUS FOR A JOINT RESEARCH VENTURE THAT THE JOINT VENTURERS MUST AGREE THAT (1) IF THE JOINT ENTERPRISE "CONFERRED A SIGNIFICANT COMPETIVIVE ADVANTAGE ON (ITS) MEMBERS, THE ADVANTAGES OF MEMBERSHIP (WOULD) BE MADE AVAILABLE TO OTHERS ON SUBSTANTIALLY EQUAL TERMS;" (2) "THAT (THE JOINT VENTURERS WILL), AVOID ANY UNREASONABLE RESTRICTIONS ON OUTPUT;" AND (3) "THAT THE (JOINT VENTURERS WILL) NOT ENGAGE IN DISCRIMINATION IN PRICE OR SERVICE UNLESS RATIONALLY JUSTIFIED."[6]

I APPRECIATE THE OPPORTUNITY TO MAKE THIS COMMENT AND ASK FOR ADDITIONAL TIME TO ALLOW MY COLLEAGUES TO COMMENT PRIOR TO ANY FINAL COMMITTEE ACTION ON THIS BILL.

I WILL BE DELIGHTED TO RESPOND TO ANY QUESTIONS ANY MEMBER OF THE COMMITTEE MAY HAVE.

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[6] Pitofsky, "Joint Ventures under the Antitrust Laws: Some Reflections on Penn-Olin" 82 Harv. L. Rev. 1007, 1053, 1054 (1969) ; See also, Donald I. Baker, "Application of the Antitrust Laws to Joint Venturers" 18th Annual Advanced Antitrust Institute, Practicing Law Institute, at p.156 (November 3, 1978)

The CHAIRMAN. Who is next to speak?

TESTIMONY OF ELEANOR M. FOX

Ms. Fox. Thank you, Mr. Chairman, distinguished Senators.

In my view, S. 1841 is not a good idea. Although it is billed as a bill to promote inventiveness, I do not believe that it will promote inventiveness. It is certain that it will not give business greater certainty. At the margin, it might increase the degree to which some arguably illegal joint ventures are consummated. However, those joint ventures at the margin of the law are probably at the margin because they include so much of the industry that they lessen technological progress because they deprive the country of a competing group, maybe the other half of the industry, from providing a technological challenge.

I would like to make one brief observation and then address very quickly three questions. One, should we codify the rule of reason? Two, should we reduce the private incentives to challenge research joint ventures? Three, if it is the case that American of the 1980's is not sufficiently inventive, why, and are we identifying the right culprit?

My background observation is that I believe this bill is a small but significant step on the road away from Congress design to give private plaintiffs the incentive to sue. It may be the time to reexamine treble damages and attorneys fees. But, if we do so, we should do so in a broad context with careful thought, both about whether this shift is warranted and about the various alternatives that are being offered. We should not do so in a back-door way, virtually abolishing private enforcement.

Should we codify the rule of reason for R&D joint ventures? I think the answer is clearly no. It is widely known, in fact it is entirely well known, that research and development joint ventures are not illegal per se. If there was any question because of very old case law, then surely a case such as BMI versus CBS—a joint venture but not research joint venture case—has made it entirely clear to the bar and the business community that joint ventures are not illegal per se.

I do not believe that a prospect of per se treatment has chilled any research joint ventures. I also think that it is dangerous to try to codify a rule of reason and thereby draw a line between the per se rule and the rule of reason. It is very, very hard for Congress to draw the line in the right way. I believe that the case law is a much better vehicle for doing so.

I worry, for example, about the way the line is drawn by the Rodino bill. I worry that too much shelter might be given to certain transactions. For example, suppose General Motors and Toyota had a research joint venture to develop engine technology and it produced engine technology and the joint venture licenses the technology to the joint venture partners, who divide up the world. A plaintiff should have a right to claim that the transaction is illegal per se and, in addition, it should not be sheltered by a law that allows only single damages.

At the same time, the sheltered category may be perceived as underinclusive, and everyone will be pounding on the door for a sheltering of the type of activity they like best, an activity, for example, like COMSAT, or an activity like exclusive territories, may be offered up as next in line to get a codified rule of reason. I think this is a dangerous trend to start.

Second, should we reduce private incentives to challenge research joint ventures? First, I think we should deal with the question of reducing private incentives in a global way, not in this narrow way.

Second, I think we ought to focus on what the reduction in private incentives will do with respect to research joint ventures. All it will do is facilitate the marginal joint venture, which may lessen technological development because it combines a whole industry. Virtually every other research and development joint venture is very clearly legal. No case has been made for lessening the incentives to challenge questionable research joint ventures.

Let me turn very briefly to a third question, are we really addressing the right problem?

I think we are addressing the wrong problem. I do not think the antitrust laws are in any way chilling research joint ventures. If I were pressed to identify culprits, I would point our trade policy. Trade barriers have deterred inventiveness; they help make American companies lazy. In steel, for example, trade barriers made American firms complacent.

In addition, I think a lax monopoly law has contributed to a lower level of invention. Dominant firms can pursue strategies almost without interference. Emerging competitors, if they invest in technological development, are investing in a very hostile environment.

I would take to heart the maxim, if it isn't broken, don't fix it. Our antitrust laws, as they apply to research joint ventures, are clearly not broken. I would hope the Congress would not try to fix them.

The CHAIRMAN. Thank you very much, Ms. Fox.

[Prepared statement follows:]

Statement of

Eleanor M. Fox
Professor of Law
New York University
School of Law

Mr. Chairman and members of the Committee:

My name is Eleanor Fox. I am a Professor of Law at New York University School of Law. I served as a member of President Carter's National Commission for the Review of Antitrust Laws and Procedures and I am a past Chair of the New York State Bar Association Section of Antitrust Law.

I am pleased to accept your invitation to testify today on S. 1841, a bill "to promote research and development, encourage innovation, [and] stimulate trade . . . ." The bill would apply the antitrust rule-of-reason to joint research and development ventures, and if the joint venture is disclosed in advance to the Justice Department and the FTC, the bill would limit antitrust recoveries to single damages and allow awards of attorneys fees and costs to prevailing defendants unless the court determines that the award is unjust.

I. Introduction

In my view S. 1841 is not a good idea. It will not promote progressiveness. It will not give business greater certainty. While it may induce consummation of some joint ventures at the margin of legality, these joint ventures are likely to be at the margin only because they include so much of the industry that they block important avenues for development of competing technologies.

I would like to make two observations reflecting my major concerns with the bill, and then to address, more methodically: (1) Should we codify the rule of reason for R&D joint ventures? (2) Should we reduce private incentives to sue? and (3) If America of the 1980s is not significantly inventive, why?

My two initial observations are:

(1) The bill accepts the view that what is good for Japanese business will work for American business, and it accepts the conception that extensive cooperation rather than competition has advanced Japanese technological progress. I doubt that either conception is correct. The problem is misdiagnosed and this bill will not tend to solve the problem.

(2) This bill is a small but important step on the road away from Congress's design to give private plaintiffs the incentive to sue. There may be room for reform of treble damages and attorneys fee awards, but particularly in this day when the Government does not challenge even probably illegal transactions, it is very important not to back into a scheme that virtually abolishes private enforcement.

II. Should we codify the Rule of Reason for R&D Joint Ventures?

My answer is, No. It makes no sense to pass a statute to say that transactions clearly not illegal per se are indeed not illegal per se. It can hardly be claimed that fear of per se treatment has chilled pure research joint ventures. Everyone knows that pure research joint ventures are not subject to a per se rule. See, e.g., Broadcast Music, Inc. v. Columbia Brodcasting System, Inc., 441 U.S. 1 (1979), where the Supreme Court rejected per se treatment of a joint venture involving pooling of product by thousands of competing composers of music. See also Antitrust Guide Concerning Research Joint Ventures, U.S. Department of Justice (Nov. 1980).

If codification of the rule of reason were at worst benign, I might be indifferent to this aspect of the bill. But codification is not benign, for two reasons. First, codification for research joint ventures will lead to many more statutory amendments and will produce a crazy quilt of antitrust. Research joint ventures have no better claim to a codified rule of reason than do a great variety of other practices. Indeed some types of transactions may have an even greater claim; for example, ventures such as COMSAT, or types of restraints such as exclusive territories, which may hold anticompetitive risks but promise procompetitive benefits. If Congress codifies the rule of reason for pure research ventures, it will not stop there. Applicants for equal treatment will stand in line. Antitrust will become a charter of regulation, rather than the charter of freedom of the generality of the Constitution that Congress intended.

The second danger is exacerbated by the first: Statutory codification of the sort suggested is necessarily imperfect. Congress cannot adequately legislate the line between the per se rule and the rule of reason. It cannot easily find language to include in the rule of reason every case that should be included nor to exclude every case that should be excluded. What, for example, is or should be a joint research and development venture for purposes of this bill? Surely joint ventures that restrict participants' independent research should be excluded from special protection, and they would be if the Committee should adopt the exclusionary language of the Rodino bill, H.R. 4963. But should other conduct be excluded? Does even the Rodino bill shelter conduct that may be illegal on its face? Suppose General Motors and Toyota should form a research joint venture to develop engine technology; the joint venture develops the technology, and it grants exclusive licenses to GM for exploitation in the United States and exclusive licenses to Toyota for exploitation in Japan. The bill seems to preclude the claim that this is a division of markets illegal per se, but that claim should be open to a plaintiff.

The underinclusion problem (sheltering too little) is as serious as the overinclusion problem (sheltering too much). If Congress makes the definition of research joint venture so bland that everyone agrees that it covers only joint ventures that are legal, the new law would be worthless; it would give no protection to the only transactions that a bill is arguably needed to protect.

A second set of problems arises from implications to be drawn from language that excludes stated restrictions from the bill's protections. Does the Rodino bill imply that excluded restrictions are per se illegal? They are not all per se illegal under existing law.

A third set of problems arises from the dangers of misuse of the legislation. An example is suggested by Berkey Photo, Inc. v. Eastman, Kodak Co., 603 F.2d 263 (2d Cir.), cert. denied, 444 U.S. 1083 (1980). Kodak had what it claimed to be a research joint venture with General Electric and another with Sylvania to develop flash cubes that attached to amateur cameras. In each case Kodak got exclusive rights to the invention. It turned out that Kodak was not really a contributor to the technology but used the joint venture vocabulary as a cover to require the inventor to withhold the development from Kodak's competitors. My point here is not that Berkey would have been legally deprived of the chance to uncover the real nature of the transactions, but that the codification in S. 1841 (combined with the detrebling and attorneys fee provisions) would have made it much harder, less rewarding, and therefore less likely for Berkey to have done so.

For all of these reasons I think that it is hazardous to legislate the line between the per se rule and the rule of reason. I think it much wiser to leave the line to the case law.

III. Should we reduce private incentives to challenge research joint ventures?

For notified research joint ventures the bill would detreble awards to prevailing plaintiffs and allow awards of attorneys fees to prevailing defendants. Is this a good idea?

This question calls for both a broad and a narrow focus. The broad question is: Do we want, in general, to lessen incentives of private plaintiffs to sue and thereby to give business greater freedom to do what it will, and if so how should we accomplish this result? The narrow question is, should we shift the balance between incentives to sue and incentives to combine with respect to research joint ventures, and should we do so in the manner provided by the bill?

Regarding the narrow question, what will be the effect of S. 1841? The effect of reducing private incentives to sue would be to facilitate research joint ventures on the margin between legality and illegality. Almost all pure research joint ventures are in the clear light of legality. The Government has never challenged a pure research joint venture,* and to the best of my knowledge no private party has made such a challenge either. There are few circumstances in which one can imagine an illegal pure research joint venture, when it is not a cover for dividing markets or other anticompetitive behavior. The most readily imagined circumstance is the case in which all of the industry joins in the venture and the alternative to this inclusive joint venture would be several groups competing against one another to produce new technology. Thus, the joint venture may be illegal because it retards technological progress. It is hard to see why the law should make a challenge to this marginal joint venture more difficult.

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* See Garvey, Study of Antitrust Treble Damage Remedy, Report to the Committee on the Judiciary, U.S. House of Representatives, 46 BNA Antitrust & Trade Regulation Report 356, 367 (March 1, 1984).

Let us look, now, at the broad question, for the question is a critical one of general applicability and small steps on the road toward shifting incentives* are not unlikely to lead to an avalanche in the same direction.

It may be the time to reexamine the balance between plaintiffs' and defendants' incentives. However, the need for revision is not clear,** especially at a time when the substantive law has become more conservative. Moreover, the possible approaches to revision are varied*** and deserve full and separate consideration.

For example, S. 1841 incorporates the view that detrebling and shifted attorneys fees should be anchored to the line between the per se rule and the rule of reason. One should consider whether this approach puts too much weight on the distinction between the per se rule and the rule of reason. In law, the distinction between per se and rule of reason is not grounded on harmfulness of the activity to American consumers. The line is drawn on the basis of practical realities: whether we can tell on the face of the practice, without a detailed inquiry, whether the practice is almost always harmful to competition and whether it almost never has benefits to competition that cannot be realized in less restrictive ways. See, e.g., Fortner Enterprises, Inc. v. United States Steel Corp. 394 U.S. 495, 503 (1969). Thus, we have a per se rule against resale price maintenance and a modified per se rule against tie-ins, although one can give examples of tie-ins and RPM that are not pernicious.

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* A prior similar step was taken in the Export Trading Company Act of 1982, which was billed as "perhaps the most important single piece of legislation on international trade to be enacted in a generation." Omer, Undersecretary of Commerce for International Trade, reported in CCH Trade Reg. Reports No. 578 p. 8 (Jan. 24, 1983). The President promised that the act would result in hundreds of thousands of new jobs. There has been, however, a low volume of requests for Export Trading Certificates of Review, and to the best of my knowledge the act has not increased exports.

** See C. Sullivan, Breaking Up the Treble Play: Attacks on the Private Treble Damage Antitrust Action, 14 Seton Hall L. Rev. 17 (1983).

*** See Garvey, supra.

A danger is, therefore, that the approach reflected by the bill will draw more activity into the rule of reason, unnecessarily complicate the litigation process, and increase the costs of enforcing the antitrust laws.

I think it would be a mistake to set out on the path of single damages and shifted attorneys fees, and to do so in the name of promoting technological progress, when this bill has almost no chance of promoting technological progress, the scheme for lessening private plaintiffs' incentives is rather revolutionary, and the chosen path may not be the best among alternatives.

IV. Why is America of the 1980's not sufficiently inventive?

What is really the problem? Is it, as the bill apparently supposes, that American firms want to pool their talents to develop technology they cannot invent on their own, but that they do not do so because they may be sued and because if they win they must pay the costs of suit and if they lose they must pay three times the harm they caused rather than simply compensation?

I do not think this is so. The very leniency of the law suggests that it cannot be true.

I suspect that Chairman Rodino is right. To a large extent U.S. firms are not inclined to get together to share their technological knowhow and ideas with their competitors. Their search for the competitive edge is inconsistent with their pooling of secrets. One can hardly imagine Apple Computer gleefully disclosing its proprietary information to IBM in the hope that the American computer can keep ahead of the Japanese. This American ethic of independence is probably good for progressiveness. The American firms may invent best when they invent alone.

If I were pressed to assign reasons for an unacceptable level of technological progress, I would assign two. First, trade barriers. Trade barriers are an invitation to laziness. The years of protection of the steel industry removed foreign competition as the spur to invention that it should have been. When cheap foreign steel was at our back door, we erected government restraints. Not until foreign steel was in our front yards did America begin to meet the challenge by putting up mini-mills -- and those who met the challenge were emerging businesses. The mini-mills are efficient and inventive and may be our hope for the future in steel.*

A second disincentive to progressiveness is our lax monopoly law. Under current interpretations by a number of circuit courts, a dominant firm can do no wrong. For all practical purposes, it may engage in strategies that discipline emerging challengers as long as the plaintiff cannot prove that the dominant firm went below its marginal cost.**

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* See "Mini-Mills: Steel's Bright Star," N.Y. Times, Feb. 24, 1984, D1, c. 3.

** See L. Sullivan, Monopolization: Corporate Strategy, The IBM Cases, and the Transformation of the Law, 60 Tex. L. Rev. 587 (1982). Compare the current state of the law, which defers to the judgment of the dominant firm, with Judge Wyzanski's observations in United Shoe:

> [O]ne point is worth recalling. Compo's inventors first found practical ways to introduce the cement process which United had considered and rejected. This experience illustrates the familiar truth that one of the dangers of extraordinary experience is that those who have it may fall into grooves created by their own expertness. They refuse to believe that hurdles which they have learned from experience are insurmountable, can in fact be overcome by fresh, independent minds.
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> . . .The dominance of any one enterprise inevitably unduly accentuates that enterprise's experience and views as to what is possible, practical, and desirable with respect to technological development, research, relations with producers, employees, and customers. And the preservation of any unregulated monopoly is hostile to the industrial and political ideals of an open society founded on the faith that tomorrow will produce a better than the best.

United States v. United Shoe Machinery Corp., 110 F. Supp. 295, 346, 347 (D. Mass. 1953), aff'd per curiam, 347 U.S. 251 (1954).

As a result, the entrepreneurial small or middle-sized firm invests, if at all, in a hostile environment, and the rewards of aggressive inventiveness may not be worth their costs.

I am not proposing a statutory modification to Section 2 of the Sherman Act, and I know that lowering trade barriers is a politically difficult -- although not impossible -- task. I suggest here only that we do not misidentify culprits. We should take to heart the old maxim: If it isn't broken, don't fix it. The law regarding research joint ventures is not broken. I hope that Congress will not try to fix it.

Thank you.

The CHAIRMAN. Mr. Angoff.

TESTIMONY OF JAY ANGOFF

Mr. ANGOFF. Mr. Chairman, thank you very much. I think the first question to ask about any legislation——

The CHAIRMAN. Have you got a statement that you want to put in the record?

Mr. ANGOFF. If I could submit a statement for the record later, I would appreciate it. I do not have a prepared statement with me. But I will be brief.

The CHAIRMAN. All right, you have 7 minutes.

Mr. ANGOFF. The first question, I think, that has got to be asked about any legislation is, is there a need for the legislation? And in this case I think that there has been a lot of talk, there have been a lot of statements made that there is a need for it; but I think, when you look at the evidence, the evidence shows pretty conclusively that there is no need for it.

First, there has been no case in which a court has held a research and development joint venture unlawful. Second, in the last 15 years, the Justice Department has brought only two cases involving research and development joint ventures. Both of those challenged not the joint venture itself but a collateral anticompetitive term.

Third, in the last 15 years there has been only one private case involving a research and development joint venture. That one, too, challenged not the joint venture itself but a collateral anticompetitive term.

Fourth, Mr. Chairman, if that were not enough, the Justice Department in November of 1980 came out with this book, which explains very carefully the analysis the Justice Department goes through in determining whether or not a research joint venture is unlawful. And if that were not enough, the Justice Department now has a business review procedure pursuant to which the Justice Department actually does the work of the corporate lawyer. People contemplating a joint venture can actually go to the Justice Department and ask the Justice Department whether it is going to sue or not, and the Justice Department will give its answer.

So, I think there is no evidence whatever that there is a need for this legislation.

In addition, the proponents have not even come up with examples of joint ventures that were contemplated but not undertaken because of supposed fear of the antitrust laws.

Finally, I would just like to point out that the FTC just a few weeks ago approved a joint venture, a pure production joint venture between two direct competitors who have about 50 percent of the U.S. market, almost that much of the world market. Certainly, if the Government is going to approve a pure production joint venture, it is certainly going to approve a pure research joint venture.

The second question is, if there is no need for the legislation, does it do any harm? I think, if the legislation were written correctly, it would not do an enormous amount of harm. For example, if you took the three first sections of the House bill, I do not think that would do a terrible amount of harm. It is true you would codify the rule of reason, and I agree with Ms. Fox that is unnecessary; but it would not be all that positively harmful. You could go even a little bit further and set out the criteria that a court would consider in determining whether an R&D joint venture was lawful.

But all bills go much too far. There are two basic formats they take. The House bill allows joint ventures to disclose. When they disclose, it means the most success a plaintiff can get is single damages. If he loses, he pays the defendant's attorneys fee.

The other way to go is to have a joint venturist go to the Justice Department and get a certificate of immunity. If they get that, then they are totally immunized.

I would just like to suggest that there is one saving grace of the House bill, Mr. Chairman. That is that first it defines what research and development is, and then it defines what research and development is not. I think it is very important to put in the legislation what research and development is not. Unfortunately, in the amendment before this committee now, that section, which is the only section that protects plaintiffs, has been taken out. In fact, that bill goes even further. It grants immunity not only to specific R&D activities but to—and this is a quote—any other conduct reasonably necessary and appropriate to such a program.

This language can immunize an enormous number of activities, including price fixing and market division.

In conclusion, Mr. Chairman, I would suggest that there has been no need demonstrated for this legislation. More importantly than that, you know, we already subsidize R&D heavily. Through the Tax Code we can expense R&D, that is, write it off in the first year. You get a 10-percent investment tax credit. That is, if a company spends a dollar in R&D, they really pay 90 cents; and you and I and the rest of the taxpayers are paying 10 cents. In 1981, there was another 25-percent R&D tax credit enacted. There was an additional tax break in 1981 enacted, which allows people who contribute R&D equipment to universities to get more back than they paid for it. So, I think we are already giving quite a bit of incentive to R&D. Before going any further, we should demand some performance.

The second reason that I think this legislation is absolutely unnecessary and would do positive harm is that it is just one in a number of special interest exemptions that have been proposed to the antitrust laws in the last few years. When you go this far, I do not know where you stop.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

I want to thank all of you for your appearance here. I do not know whether I have any questions especially to propound to you. As I understand, most of you feel that maybe the joint venture for research and development might be helpful, but you would prefer to maintain the treble damages here as you do in other antitrust suits.

Also, Senator Tydings, regarding the attorneys fees, I believe you said you felt we ought to——

Mr. TYDINGS. I believe that would be a most serious step backward, not only in antitrust but in tort litigation generally, Mr. Chairman. I think it would deter, it would make it impossible for the small businessman really to undertake an antitrust case of any type. You would be putting him right back to where he was before the Sherman Act and the Clayton Act, and I do not think you want to do that.

The CHAIRMAN. Congressman Rodino has set out, as you mentioned, I believe, what is research and development and what is not.

Mr. ANGOFF. That is right, and that is a very important provision.

As I said, we think this legislation is unnecessary. But, if Congress decides that legislation such as this is necessary, it is essential that in that legislation there is defined what R&D is not. Otherwise, it provides too much shelter for anticompetitive activity.

The CHAIRMAN. I think some of you might be under the impression that this might be an entering wedge to destroy antitrust law. I can assure you that will not be done.

The purpose of this whole bill, as I understand it from those who favor it, is to keep our Nation abreast of the rest of the world with technology and development. We can do this without great jeopardy to a lot of little companies that want to develop. Someone brought out here, I believe, that most of them are small companies. There are some big companies, too. Most of these companies that want this protection are little companies. We can protect them from treble damages without jeopardizing the rest of the antitrust field. Then that is a different situation.

Mr. TYDINGS. Mr. Chairman, I do not think it is the smaller companies that need the protection of an exemption from the antitrust laws. I think that the smaller companies need the protection of being able to compete fairly in research and development and other areas without interference from powerful monopolies or competitors using anticompetitive practices.

I can think of a situation where two major corporations decide to pool their efforts on research and development. And under the terms of this legislation then they could conspire to harass, use predatory practices, steal away persons working for the smaller company, which is competing in research in the same field, and ultimately put the small company out of business. And conceivably that small company would not have a right under your antitreble damages provisions to go against the very persons who put him out of business.

Quite frankly, I am up here as a private citizen, really, although I am a partner in a law firm which frequently represents parties on the other side of the philosophical fence, because of my deep concern and conviction that we need free competition and we need to protect the basic anticompetitive laws as they are on the statutes. The United States must retain its free enterprise system. We must always make certain that the smaller companies can effectively compete with the larger without fear of the monopolistic and preditary interference that flourished after the Sherman and Clayton Acts. My basic concern is that, if you adopt the legislation as proposed and begin to limit treble damages relief and then add to this very chilling deterrent for any plaintiff, the fear that if they should lose a motion or lose their last antitrust case that they will also be liable for attorneys fees, then you have taken a major and serious step backward in the protection of free enterprise in this country.

The CHAIRMAN. You may have a number of little companies that are not big enough to combine with, say, two big companies, but a number of little ones may want to come together and do this joint venture for research and development. This might enable them to compete with other countries in the world and other companies in this country. So, I think this matter has been pretty well thought through by a lot of people. I can understand your positions. We thank you for appearing here and explaining your positions. At the same time, there is another view of this, that small companies, I understand, favor very much.

I believe that is all the questions I have for you. Now we will turn to the Senator from Ohio.

Senator METZENBAUM. I would like to just ask our panelists this. If you have any novel ideas or innovative thinking along the line, for example, of separating the damage amounts with respect to companies having a net worth below, say, $5 million and those over; or ideas that would provide that perhaps there is some damage amount other than single or treble, perhaps some modified figure in R&D matters; or something having to do with the time, with the amount of damages that were recoverable, if the action is delayed in being brought until the venture has become a successful one; or any 1 of 20 other ideas that you may have, I would be very receptive to having you bring your thoughts to the attention of my staff.

You are realistic enough to understand that the bill has a load of steam going for it. It is a railroad on a track. There is a lot of pressure being brought. That does not mean that it is going to pass, because it is going to be a short session. But, if we could find some compromise way of resolving the issue, since I tell you up front that I support the concept of what has been attempted in this effort, I would be very receptive to hearing from you on the subject.

So that you may know, this is the same message that I have sent out to the proponents of this measure for the last year or year and a half that it has been kicking around. That is that I do not have any problem with trying to achieve the objective, but do not do it at the price of treble damages and attorneys fees.

If you come up with some ideas, even if you do not want to be credited with being the author of that idea, we will accept them from you without identifying the author. And I will not tell anybody, Joe, that you told me unless you tell me that I can.

I think it would be helpful if you put your heads together or if individually you have any innovative thinking on the subject.

Thank you, Mr. Chairman.

The CHAIRMAN. You are welcome.

We thank all of you very much for your appearance here. We value your testimony. It will receive careful consideration.

Next we will hear from Mr. Joseph R. Creighton and Mr. Stephen J. Olson.

Senator METZENBAUM. Mr. Chairman, may I say that, before we hear these two witnesses, I have a group of people meeting me in my office at 4 o'clock. If I slide out before you have concluded, gentlemen, it is not as an insult to you because I am not interested. I will read your statements.

The CHAIRMAN. Mr. Creighton, would you state your name for the record and the company you are with and where you live, and then you may proceed.

STATEMENTS OF A PANEL CONSISTING OF JOSEPH R. CREIGHTON, VICE PRESIDENT-GENERAL COUNSEL, HARRIS CORP.; AND STEVEN J. OLSON, ASSOCIATE GENERAL COUNSEL, CONTROL DATA CORP.

Mr. CREIGHTON. My name is Joseph R. Creighton. I am vice president-general counsel of Harris Corp. in Melbourne, Fla.

Senator METZENBAUM. Why did you leave Cleveland? That is the worst part about it.

Mr. CREIGHTON. Well, we liked Cleveland. We also like Florida. But we had a lot in Florida already.

Senator METZENBAUM. All right.

Mr. CREIGHTON. I propose, if I may, to submit most of my statement for the record.

The CHAIRMAN. Without objection, the entire statement will go in the record, and you may summarize it.

Mr. CREIGHTON. I might say that Harris——

The CHAIRMAN. As I understand, you favor this bill, do you?

Mr. CREIGHTON. Yes, we are in support. We believe that antitrust amendments are very necessary for research and development. I would like to make some comments.

The CHAIRMAN. All right, if you could just do it while the Senator is here, in plain language, just tell us why you favor this bill.

Senator METZENBAUM. Not too complicated.

Mr. CREIGHTON. Well——

The CHAIRMAN. It is more effective when you do that than when you read a long statement.

Mr. CREIGHTON. Unlike most of the other witnesses, unlike attorneys general, unlike the antitrust division, unlike law professors, I deal with the law before it occurs rather than afterwards. That is to say, I give my advice about a project at the idea stage. And it is very difficult to know exactly what that project is going to be.

Today, as Mr. McGrath pointed out, there is very little law applicable to research and development. Now, I have been more than 30 years, off and on, doing antitrust work. I have been in corporations for some time, and I have been a general counsel for 16 years. Recently, in connection with, I believe the Senator mentioned, MCC, of which we are a member, I, of course, had to give an opinion as to—as part of MCC, I was called upon to make a legal opinion. I went outside to bolster my opinion with outside counsel. I got a 30-page opinion back, which started out saying, in substance, there is a dearth of authority with respect to the application of the antitrust laws to joint research and development.

We believe that there is not enough guidance today as to what the law is. Now, you understand we went ahead, but the advice I gave was, I am sure we can do this. What I am not sure of is whether we can do all that is necessary to achieve the objectives which our business people desired, and furthermore that you are going to have to have lawyers with you all the time. And that is not conducive to a good research and development project.

It was about that time that I decided personally that, rather than try to take the risks and steer through these stormy waters all on our own, that we really ought to have some clarification.

There is a variety of disagreements as to just exactly how this should be done. There are a lot of different ways, perhaps, this problem could be met. This bill has selected some varied points, which I think there is a fair consensus on. And that is a confirmation that the rule of reason applies. Now, all of us, I think, believe that the rule of reason does apply, and this is not probably a per se violation. But, at the same time, that is not clear under the law today. There are no Supreme Court decisions in this field. There are practically no other court decisions. And there is a lot of law dealing with agreements with competitors. And, let us face it, the problem is to do this, companies like ours have, say, $200 or $300 million of sales in businesses competing with those that are selling in the same business $10, $15, $20, or $30 billion. And we cannot cover all of the research and development in every field we want to be in all by ourselves. We can do some. But we are in computers. We are in semiconductors. We are in communications equipment. And we want to be able to spread our money over more ventures and make ourselves a more viable competitor.

There are no clear rules that say the rule of reason applies. So, that is the first part of the bill.

We also think the present disincentives to R&D are too great. That relates to the matters of the treble damages and the matters of the defendant's attorneys fees.

With respect to treble damages, in the first place, you start out in the antitrust field with the sheer costs of litigation being a great penalty. Then, in addition to that, you have the risk.

Remember, when you start out—and joint R&D is different, you know. You do not know what market you are talking about. You do not know what product you are talking about. Your only problem is going to be if you are successful. The more successful you are, competition means success, and it means a winner and it means a loser. And our competitive system expects that there will be injured other companies. What the law says is that that is good, provided you do it in a fair fashion.

We think that properly defined R&D creates very little danger. The rest of the antitrust laws still apply if those people go beyond the limits; that is to say, this is no immunity. Nothing that is being proposed is immunity. What we are saying is, to the extent they stay with R&D, then to that extent there ought to be better protection. Therefore, we support the provision for limiting treble damages. And we also support the provision for defendant's attorneys fees. I am not in favor of awarding either party attorneys fees. I know of cases that are brought because everything the plaintiff's lawyer spends—he does not have to prosecute his case very rapidly; he does not have to spend an awful lot of his own time; but, to the extent he does, he gets the chance of getting roughly a large contingent arrangement or an attorney's fee award.

Last September there was an editorial in the Washington Post where they pointed out that some plaintiff's attorneys had been awarded $40 million in attorneys fees. Now, that is not a problem of just small companies. That is to say, our company is not very well equipped to pay attorneys fees of that kind. So, we think all of these provisions are very important.

I would like to emphasize that we need to clarify the law so that we know better when we go into it what risk we are taking, without the typical lawyer's qualifications, and we need to cut those disincentives, that extreme risk you have when you join.

Thank you very much.

The CHAIRMAN. Thank you very much. Senator, would you like to question?

Senator METZENBAUM. Yes, please. Mr. Creighton, you are part of the MCC now, are you not?

Mr. CREIGHTON. Yes.

Senator METZENBAUM. And you are going forward with joint R&D in that deal now?

Mr. CREIGHTON. Yes, we are.

Senator METZENBAUM. Yet, you think that this legislation is necessary because you are just a little bit apprehensive and a little bit worried. But, regardless of whether we pass the legislation or not, you will continue forward in the MCC deal, will you not?

Mr. CREIGHTON. We will continue in some fashion forward.

Senator METZENBAUM. Since some of us are willing to have legislation clarifying the situation, although we question whether it is needed, since you are obviously going forward anyhow, since it is obvious that, if this bill were to come to the floor tomorrow morning, which we all know it will not, it would be a magnificent vehicle to put on an oil company antimerger amendment, to put on an Illinois Brick amendment, to load it up with a host of other amendments. Yet, the fact is that, if we were to be able to come to some agreement to get you the clarification that you need, without touching the treble damages and the attorneys fees, that bill could probably be passed on the floor of the U.S. Senate by unanimous consent.

Would it be worth it to you to get the clarification and to give up the idea of the treble damages and the attorneys fees if that could occur?

Mr. Creighton. Well, Senator, I am not an expert in what can be passed and what not.

Senator Metzenbaum. That is not my question. I am asking you would it be worth it to you to get—if you could get this bill through in the next several days, would it be worth it to you——

Mr. Creighton. I obviously would have to look at a specific bill to know the answer to that question.

Senator Metzenbaum. No, I am telling you the bill that you want, the bill that clarifies what is joint R&D. We know the bill. We know that we are talking about either the Rodino bill or the Rodino-Thurmond bill or whatever. But it is a bill that you now support. Now I am saying to you, if the price of getting that through is to drop the treble damages and the attorneys fees provision, is it worth it to you?

Mr. Creighton. Well, Senator, if you will pardon me, I need to say something else to explain what I am going to say. We started about a year ago with the idea that, with the turmoil in antitrust legislation, in the past Senate terms, with Illinois Brick and contributions and all, that we felt that this was important enough to try to work for a single objective and to get some reasonably broad consensus. We have been doing that for a year. And although I am speaking personally for Harris Corp., nevertheless we have been the leader in that effort.

Taking into consideration all of those views as I know them—and I cannot clearly speak for all of them—but I think, if I took all those together, I would have to say the answer is no.

Senator Metzenbaum. Do you mind if I ask Mr. Olson the same question?

The Chairman. No, go ahead.

Senator Metzenbaum. Mr. Olson, you and I have met on a number of occasions. We have discussed the subject.

Mr. Olson. Yes, Senator.

Senator Metzenbaum. We have agreed that it is going to be difficult to get this bill through if it is still in a controversial posture. You may think that you can. But the question I will ask you is, you are now into the MCC view. You are the moving factor on it. You are the lead factor on that deal. Query: if the price of getting this bill through, clarifying the situation, would be that at this point—and you might want to come back at a later point, with respect to the treble damages and with respect to attorneys fees—would your consortium or group or whatever you call it, would you be willing to drop the attorneys fees and the treble damages if you could pass this bill in very short order?

Mr. Olson. First, let me identify myself for the record, Senator. I am Steven Olson. I am associate general counsel of Control Data Corp., also a member of MCC, as the Senator has pointed out.

Senator Metzenbaum. Does MCC stand for something?

Mr. Olson. Yes, Microelectronics and Computer Technology Corp.

Senator Metzenbaum. Thank you. And that is the group that consists of how many different corporations?

Mr. OLSON. Fourteen, including Control Data and Harris, among others.

Senator METZENBAUM. IBM?

Mr. OLSON. IBM is not in MCC.

Senator METZENBAUM. What are the others?

Mr. OLSON. The 14 members are Control Data, Harris Corp., Mostek, Advanced Micro Devices, Martin Marietta, National Semiconductor, Motorola, Honeywell, Digital Equipment, Sperry, Rockwell, RCA, NCR, and Allied Corp.

Senator METZENBAUM. Please go ahead.

Mr. OLSON. To respond directly to your question, it would depend a great deal on the bill and the extent to which it clarified the law. Now, if it were simply to take the Rodino bill or the bill that we are now discussing, S. 1841 or some amendment that is going to be offered, and that bill merely codified the rule of reason and said the rule of reason applies to joint R&D, that, in our view, is not a clarification. That is the problem, that the law is ambiguous and unclear. It does not provide a vehicle for business executives and lawyers to predict with certainty what the legal status of their venture is.

Senator METZENBAUM. If that is not a clarification, and whether I agree or disagree, that is not relevant. The question is, does the elimination of treble damages and attorneys fees, being awarded as against the plaintiff, is that a clarification?

Mr. OLSON. No. I would characterize that as a back-door approach to the problem. The administration, among others, have criticized another approach, and I believe it was embodied in the first bill to be introduced in the Senate, 737, introduced by Senator Mathias and several others. It sought to define what a legal R&D joint venture should look like. If the venture conformed its activities to the standards set out in the bill, and they may not be the perfect standards but at least they defined what a per se legal venture was, since it was then per se legal, you do not have to get into the question of damages and that sort of thing. That would have been a direct approach and one that Control Data continues to strongly favor.

But the administration has taken the position that you cannot come up with perfect standards. And there may be a situation where those standards will prove to be anticompetitive.

The response to that, I think, is that, by going at it in the damage modification and attorneys fees route, you may be raising greater controversy through this back-door approach. You are not providing the clarification that is needed. Instead, you are leaving the open-ended question.

As a result of that, we would favor the clarification approach. On the other hand, if it is just going to be a reenactment of the rule of reason, I agree completely with Mr. Creighton that the elimination of treble damages and attorneys fees is critical.

Senator METZENBAUM. I am going to excuse myself. But I will say to you that, if you have any innovative thinking as to how this matter can be resolved in a cooperative way, I would again urge you to come forward with that thinking because I think it would do much better for the prospects for this legislative enactment than if we have to just put it into a totally confrontational posture.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Is there anything else you gentlemen would like to say now about this bill?

Mr. OLSON. Mr. Chairman, I would like to make one or two more very brief comments about the 737 approach as opposed to the rule of reason approach. I believe it ignores the need to encourage cooperation. It overemphasizes the competitive dangers from joint research. We are not talking about joint production, manufacturing, or joint marketing, or even joint product development. Nor are we talking about merging companies but, rather, limited cooperation that could make mergers unnecessary.

The rule of reason approach fails to recognize that the potential consequences of an overencouragement of cooperative research are far more easily corrected than the potential consequences of failing to encourage such activities. Congress can alone modify the antitrust laws. It most certainly cannot itself capture lost markets and the dollars and jobs they generate. Thus, we feel that Congress should put the priority of antitrust clarification ahead of the priority of damage relief.

Clarifying what constitutes lawful cooperative research meets the problem head on, and expectations of being able to do that perfectly are misplaced. But if, nonetheless, Congress should choose to gamble with the less direct approach, I would suggest that, in addition to addressing the questions of private antitrust remedies and attorneys fees, at a minimum any restatement of the rule of reason as applied to joint research should elaborate on those competitive effects that should be the primary focus of agency or judicial inquiry. This should be specifically covered in the statute, not in nonbinding report language.

For example, in any given instance of cooperation, if the evidence showed, one, that on a worldwide basis other viable research efforts in comparable fields exist or are likely to be undertaken and, two, that provision has been made to not unreasonably deny access to the fruits of the venture by others, the likelihood of injury under any realistic hypothesis to either the competitive process or consumers would be virtually nonexistent.

Thank you. I will stop there.

The CHAIRMAN. Mr. Creighton, do you have anything else you want to say?

Mr. CREIGHTON. No, I do not have anything further to say, Mr. Chairman.

The CHAIRMAN. Without objection, we will insert Mr. Olson's prepared statement in the record.

[Prepared statements of Joseph R. Creighton and Steven J. Olson follow:]

STATEMENT OF
JOSEPH R. CREIGHTON
ON
PROPOSED AMENDMENT OF THE ANTITRUST LAWS FOR JOINT VENTURE RESEARCH AND DEVELOPMENT
BEFORE THE SENATE JUDICIARY COMMITEE

MARCH 12, 1984

Mr. Chairman, my name is Joseph R. Creighton. I am Vice President-General Counsel of Harris Corporation. Harris Corporation manufactures, sells and installs electronic communications and information processing systems and equipment in the United States and throughout the world. We have approximately 25,000 employees and our annual sales are about $1.8 billion, of which approximately 25% is sold overseas.

We manufacture such products as satellite earth stations, computers and other information processing equipment, semiconductors, digital PBX's, radio and television broadcasting transmitters, radio communications systems and mobile telephones. We also are a supplier to the Government of defense and space equipment and systems.

Harris Corporation is one of a group of companies which feel an urgent need for prompt legislation to encourage research and development in the United States and to clarify the application of the antitrust laws to joint research and development efforts. We are seeking a reasonable consensus of industry as to what type of law is needed. In addition, Harris is a member of the Semiconductor Industries Association, which is also advocating legislation to encourage joint research and development.

Because Harris Corporation is a relatively modest factor in each of several sectors of the computer, semiconductor and communication equipment industries, Harris has already felt the acute need to join in a joint research and development venture. In that connection we are a member of the Microelectronic and Computer Technology Corporation (MCC).

Although Harris is a participant in these groups seeking this legislation, the views here expressed are those of Harris Corporation itself.

Summary Statement

The need is now clearly recognized for some kind of antitrust legislation to encourage and protect legitimate joint research and development activities (R&D). However, the urgency of the issue is still in some dispute.

This Statement describes the need, shows that it is urgent and provides some details. First we emphasize a few key points.

Many experts, who initially were skeptical, now have joined a growing consensus believing that something should be done, to include specifically:

(1) Confirmation that the Rule of Reason applies;

(2) Treble damages are inappropriate; and

(3) Successful defendants should be reimbursed for their costs and attorneys' fees in the same manner as now allowed to successful plaintiffs.

These provisions are essential, but we believe further examination is needed as to their application.

In this Statement, we point to three present disincentives to joint R&D under the antitrust laws. They are:

(1) Antitrust principles as applied to R&D are not well developed, or clear, and some current antitrust guidelines are inappropriate, yet they might be applied in the absence of clarification of the rules applicable to joint R&D;

(2) No practical means is now available to obtain clarification in doubtful cases; and

(3) The penalties for misjudging the law are now excessive -- large trial costs, even in winning cases, and, if you lose, treble damages and million of dollars in attorneys' fees.

Thus, we conclude that, at the very minimum, the Congress must do something on this issue. We suggest specifically the following points for consideration:

(1) A signal must be sent to business, to the courts, and even to prosecutors that Congress recognizes that R&D is different in kind, and also in the risks it entails for the public. Joint R&D should be encouraged.

(2) That the very strict prohibition against agreements with a competitor which apply to pricing and other commercial activity are not either necessary or desirable as applied to joint R&D. The Rule of Reason should apply. There, should be a bias in favor of cooperation, not against it, provided the cooperative effort sticks to R&D, which must be closely defined.

(3) It is a deterrent to a businessmen to be told by his lawyer that the current rules as to R&D are unclear, if he is sued the litigation costs are huge, and that in even a close case, if he loses, the penalties are mammoth.

(4) R&D ventures ought to direct their efforts toward research not toward protecting themselves from unclear, but potentially crippling antitrust liabilities.

(5) The risk of even single damages can be an unreasonable deterrent, especially when coupled with the extensive cost and effort any antitrust case entails. All competition produces injury to the losers. The fact of damage is not the essential issue -- rather the issue ought to be whether the activity is regarded by society as harmful. If a joint effort is desirable, not even single damages should be assessed. Trebling should never be allowed.

(6) If activity of the group goes beyond R&D, it will remain covered by general antitrust rules. There is no need to try to write those limitations into this legislation. The group gets no general immunity by freeing the joint research from antitrust impediments.

(7) Disclosure requirements seem on their face to be desirable. However, they are inevitably burdensome and should be limited. Moreover, there is no logical connection between disclosure and penalties. For many reasons, some legitimate ventures ought to be kept secret--from competitors in foreign nations, for example. The issue of treble or single damages is distinctly different, and should be decided by looking at the merits of the issue. We should compare the purposes of the remedy, which include compensation, penalty, and creation of an incentive to sue, with the inevitable disincentive which results from excessive risk of damages.

(8) Any successful creative activity is a living, breathing being. At the start, no one can describe precisely where it will go or what activity will be needed to make it succeed. It cannot be expected to define every agreement or action in advance, nor should it have a bevy of lawyers constantly at everyone's elbow.

(9) If a venture fails, no outsider will be harmed. If it succeeds brilliantly, someone else will surely lose, even when there is no monopoly and the public is fully protected. That is the essence of competition. A new industry may be created or an existing one preserved. A group of foreign companies may be among the losers. This could happen even if they had their own joint venture. They are allowed access to our U. S. courts to sue under our antitrust laws. Not even single damages should be awarded in such cases unless the R&D venture went beyond legitimate bounds.

The merits of every venture should be reasonably judged by rules of reason as they existed when the venture began. If the venture goes too far, so as to risk harm to the general public, it should be stopped then by injunction. No retroactive penalty such as that applied to price-fixing seems appropriate.

Amplification of these points follows:

Need for Increased Research and Development

The need for increased research and development in the United States is well recognized today. Concern for our technological leadership is growing. Whatever the causes of the current situation, this nation must now take some positive action. We need to encourage research and development, and we need to remove impediments to it. Like many other companies, Harris Corporation has been increasing our internal budget for research and development. Also, we are seeking studies and research projects from government agencies such as the Department of Defense, to provide the technology base from which new products can be developed.

Although we are utilizing our own corporate resources to meet our urgent need for more research and development (R&D), unfortunately the number of potential research projects seems unlimited and our budgets are necessarily very limited in

an intensely competitive business. Our environment today is no longer that of a United States market dominated by American companies. Competition is worldwide today. We at Harris sell in the United States in competition with foreign companies and we have substantial exports overseas, always in direct competition with European and Japanese companies. The situation has changed drastically from that which existed only a very few years ago.

We now all recognize that Europeans and the Japanese are concentrating on research and development, both generally and also on targeted areas which will enable them to develop products specifically designed to penetrate our large and free U.S. market. They do this when their own market is not open and free for most American companies to sell there. For example, I could describe to you the various steps, concessions and restrictions our company has faced in seeking sales for certain of our U.S.-made products into France and Japan.

This foreign research and development effort is often government-subsidized, directly or indirectly, and is encouraged in other ways by their governments. Although most European nations and Japan have antitrust laws, their antitrust laws are not the same as ours. Joint activity is permitted in Japan. Thus an entire industry, or a large portion of it, can be mobilized for a single objective in terms of technology or specific projects or products. Government support is available as deemed necessary.

We think it is now clearly recognized in the United States that we must meet this threat. We must act now. We need not do exactly what Japan does. We should work within our own framework of law, government and business. We should harness and encourage our American enterprise and technology. We ought to do this without regard to any foreign threat because our economy depends upon technological development.

Joint Research and Development by American Companies is now essential.

Joint research and development by American companies is one good way to meet the need for more technological development. We have the needed capabilities. Many American companies, large and small, are eager to meet the challenge and can contribute mightily. However, there are so many technologies, opportunities and projects available that medium size companies, and even some larger ones, simply cannot do all that seems required even to maintain their existing markets. This is true in our company's fields such as information processing, semiconductors and communication equipment. Some of these opportunities are clear targets for Japan and its companies.

Some projects may be too large even for America's hugest concerns. We would point to two past projects to illustrate a potential future problem. Development by private companies was deemed not possible in these cases and total government financing resulted. One was the basic development in nuclear energy and the other was the supersonic passenger plane. Regardless of the merits of the latter project, which was discontinued for policy reasons, to go ahead required United States Government funding.

We submit, that for any such large projects in the future, a better solution is to permit joint research and development by private companies - under rules which would protect the public, of course. The taxpayer should not be expected to pay for such projects, and private companies can do the job if allowed to pool their efforts in an appropriate manner.

Basic research is always a primary need, but the need goes beyond that. We also must find a way to develop already discovered concepts, technologies, materials and processes to the point where the companies in an industry can individually develop competing products for the marketplace. To do this effectively, particularly in the face of the growing foreign invasions of our markets, joint research and development is now a practical necessity. It will not harm a competitive economy: rather, if done properly the result will be stronger competition for the public benefit.

The Antitrust Laws are currently an impediment to effective joint research and development

Under existing antitrust laws (state and federal) jointly conducted research and development is certainly not forbidden under certain circumstances and by certain parties. As indicated previously, Harris is now participating in such joint activities which we believe are perfectly legal. However, as you probably know, we and some other companies have already received one threatening letter concerning MCC. At least one veteran antitrust lawyer seems to be looking towards a future large antitrust attack against joint R&D ventures.

But if the venture is now legal, as we insist, why is there a need for legislation? We believe we can give a clear answer - make a clear showing of necessity.

We see three problems with existing laws. These problems will clearly prevent some meritorious ventures, or will persuade some companies not to risk joining some other ventures, or will unnecessarily limit the activities and benefits which would otherwise be possible from clearly legal ventures.

Please note that the issue is not just legality. If legitimate ventures are to be encouraged in the public interest, companies need to be able to foresee the legality, or the illegality. If there are problems, they need to try to cope with them. They should not be dissuaded from proceeding in legitimate ventures for fear of antitrust attacks with the resulting risks, huge penalties and massive attorneys fees.

All who deal with lawyers know that a legal opinion often begins with a phrase such as "although the matter is not free from doubt", or an opinion of legality ends with a few qualifiers, such as, that the law is not yet clearly settled. This was true when I first practised antitrust law 34 years ago and I have been receiving such qualified opinions from law firms in my 16 years as a General Counsel.

Management continually asks me why we lawyers cannot provide a clear answer. They point out that they must make decisions. To illustrate, although there are 9 chances out of 10 of winning a lawsuit, if the one chance occurs and the lawsuit is lost, the disastrous effect upon the company will be exactly the same as if the odds had been reversed. Thus both the extent of the risk in terms of probability must be appraised and also the downside risk if the opinion of legality turns out to be wrong.

The difficulty of rendering clear unqualified opinions has always been a problem in antitrust but more so on some issues than others. It derives from many circumstances. For example, there may be no court cases clearly in point, or there may be somewhat similar cases which point in different directions, or a conflict may exist among the federal circuits, or the Supreme Court may not have acted. In the field of joint research and development, there are not yet enough court decisions. This makes the problem of rendering a precise opinion even more acute. Few joint R&D ventures will justify a clearcut unqualified opinion. Under current circumstances, a venture's activity sometimes will be curtailed in ways which are probably not in the public interest.

We believe necessary clarity and interpretation can be provided by legislation which will also protect the public. This is justified, and necessary, because of the three present difficulties we see with current antitrust laws as applied to joint research and development ventures. They are:

1. The Principles as applied to joint research and development are not fully eveloped and the authorities are conflicting

Our primary problem is that the antitrust laws are like the constitution; they announce policy and principle in concise and simple terms, leaving the courts to apply the law to the myriad of different circumstances which occur in our economy. We lawyers advise businessmen, and managements take action, based upon those court decisions, with the benefit of analysis by various antitruct scholars. Now we have a history of over ninety years of court decisions since the Sherman Act was enacted. The Clayton Act was first passed in 1914. Both laws may apply to these projects. The Sherman Act, as applicable here, simply forbids contracts, combinations and conspiracies in restraint of trade. What that means is left to the courts. Where the courts have not acted, we lawyers predict their future actions. History will show that corporate lawyers have often been wrong in those predictions.

In that ninety year history most cases have tested legality in terms of a wholly U.S. market. Often it has been a nationwide market, but sometimes a regional or local market. The size of the competitors and the market shares of the parties who have merged or joined together has usually been measured against statistics as to U.S. production and sales.

Even more important, it is assumed that all the competitors live by the same rules - that is, that they are subject to our antitrust laws. That was the case in the past when most markets were dominated by American companies.

All that has changed. Joint activity which may not be legal here now occurs outside our borders by companies who manufacture there and sell here. It has gotten to the point that, in some cases, all the present American producers of some products could join together and they still could not have any appreciable effect upon the market because they have been reduced to a fraction of the total vailable business. As an example, there is only one U.S. company left in motorcycle production in the United States and the market is dominated wholly by foreigners. Many traditional antitrust theories, investigatory tactics, measurement devices and remedies need to be re-analyzed in this situation.

These changed circumstances will result in new rules for action - ultimately. We already see the antitrust division of the Department of Justice making real efforts to apply the old principles to the new conditions, but that takes time and the results are not yet known. There are different views within the Antitrust Division and views change between one administration and the next. Moreover, the Department of Justice does not make the antitrust laws. They do not decide. The courts do. Private antitrust plaintiffs bring treble damage suits. Litigation lasts over many years. Appeals follow appeals. Costs and attorney's fees are tremendous. A final judgment is unlikely before ten years. A company which loses is assessed a penalty. No matter how doubtful the case, or how difficult it was to predict the results, or whether the decision was 5 to 4 in the Supreme Court, that penalty is assessed if the company loses. It is three times actual damages, which in themselves are often extremely speculative. Costs are added plus attorney's fees, which have often been assessed in millions of dollars.

That is a real deterrent.

In addition to the paucity of clear rules as to joint research and development, authoritative opinions differ as to what the rules are. The former Assistant Attorney General for antitrust has expressed views going beyond, and based upon somewhat different concepts, than the guidelines for joint research and development issued by his predecessor. The courts have not passed on these differences.

In contrast to this doubt as to the law itself, there is fairly substantial agreement that joint activities in R&D should be permitted. We believe a consensus may be developing among those who have studied this issue as to the general outline of some activities which should be permitted. Also, we believe a reasonable consensus can be reached as to what the specific rules ought to be, at least at a minimum level. If such rules as they ought to be were established for even some presently marginal ventures, joint research and development would be substantially encouraged in this country.

If nothing is done, until we know those rules ten or fifteen years from now, much clearly necessary R&D effort will simply not take place. The antitrust risks will be deemed too high.

A further problem which is particularly difficult as applied to research and development is that, by its very nature, the facts upon which legality will be based are not presently ascertainable. Most issues subject to antitrust litigation involve present products and markets, and present competitors and customers, or at least potential ones which can be reasonably predicted. In contrast, we hope to embark on research into technologies, materials, processes and the like to develop new things. Results can range from dismal failure with nothing newly developed to great success. A new technology may allow many new developments with many new companies creating and selling new products competing with new and different competitors.

Under today's rules, antitrust issues such as relevant market, share of market and reasonableness will be judged at some later time, almost certainly ten years or so from now. Judgment will be by hindsight, whereas companies today must act by foresight. In determining the relevant market, market share and asonableness, the products, and markets, and competitors, weighed by the court will be those existing at this future time. Those facts will be used whether or not we can now predict them accurately. We submit, if research and development is to be encouraged, some more certainty needs to be introduced into the antitrust laws. We believe an acceptable set of principles can be provided while guaranteeing full and adequate competition.

We are particularly concerned with the common antitrust pre-occupation with the rules as to "relevant market" and "share of market", as well as the application of concepts such as "reasonableness". What the markets are now, what the shares now may be of a particular product or industry, or what looks reasonable now, may receive little consideration in the court cases of the future. For example, you are perhaps aware of the United States Supreme Court's decision in United States v. E.I. du Pont de Nemours & Co. 353 U.S. 586 (1957). There, it was held that conduct which was not illegal when performed ripened over the years into an illegality. Specifically, although the Supreme Court expressly recognized that Du Pont's acquisition of 23% of General Motors stock was not unlawful when done in 1917-19 when GM had 11% of the auto market, by mid-century it became a violation of the antitrust laws essentially because of the growth of General Motors, not of Du Pont.

The du Pont suit was brought by the Government, and no penalty in the form of treble damages was applicable. If the same reasoning as to changed circumstances were applied to a private suit under the Sherman Act against an R&D joint venture, if a violation were found, the treble damage penalty would automatically be applied without regard to the initial good intent of the parties.

In this context, we believe the nation cannot afford to have this threat hanging over us when the rules we must live by are as unclear as they now are.

For example, is the "relevant market" to be that which exists today for today's products, in a U.S. market, or will legality of today's acts be judged by the markets of the future? Will the Justice Department or a private plaintiff be allowed the free reign now allowed by the courts to select as the "relevant market" one of a variety of possible groupings of products which may then exist, and to insist that the innovative companies who have by then best succeeded are to be penalized by the taint of a finding of illegality which, if existing law still applies, would automatically require the treble damage penalty in succeeding private suits.

We suggest that many current antitrust concepts - which have real meaning and usefulness on issues such as mergers or pricing conspiracies - should not be applied to joint R&D if it is kept within reasonable bounds. In other words, standards of conduct should be formulated to permit cooperative projects for basic research and for development of technological processes and the like, provided that the parties remain fully competitive in their other activities and in the products resulting from the research.

We believe this will enhance competition, not restrict it. In fields where one or two companies are very strong or a foreign threat looms on the horizon, the Congress can offer companies, such as ours, some reasonable certainty that the rules will be clear enough so that, under future scrutiny, the hindsight judgment applied to us will not be too harsh.

2. No practical procedure exists to resolve promptly the doubtful areas of the law

A second problem should also be resolved. No clarification of the rules will be able to cover all situations adequately. Although the law can be revised that some legitimate ventures meeting certain tests will be clearly proper, grey areas always may exist. The current business review procedure of the Department of Justice and current practices for investigations do not seem adequate to resolve the inevitable doubtful questions. Although we understand the Department of Justice's reluctance to accept responsiblity for clearing some projects in advance, we need something better than current procedures. Nevertheless, we would respect this reluctance and would stop short of asking Justice to assume responsibility for giving permanent approval for a venture.

As to mergers, the Congress has already recognized the need for providing opportunities for some sort of preliminary Government review in doubtful cases.

This was done in the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Public L.94-435 9/30/76, 90 Stat 1383 (15 USC §1 note, 8 note, 12, 15c-15g, 16, 18a, 26, 66, 1311-1314; 18USC§1505, 28USC§1407). It provides that certain proposed mergers must be reported to the Government which can then investigate to the extent deemed necessary. The Justice Department or Federal Trade Commission can then take action to delay or even stop the venture, or they can allow it to proceed, but without any grant of clear, permanent immunity.

Joint R&D actions do not create the same amount of anticompetitive danger as some mergers might, so an exact copy of Hart-Scott-Rodino would not be appropriate. For example, joint R&D ventures do not permanently join one company to another and eliminate one company from the market as does a merger, and they normally do not include the whole scope of the company's activities. Also, we think that Congress will ultimately find that there is a positive need to encourage joint ventures in research in many situations, which is not necessarily the case with respect to mergers. Thus the premerger notification rules are not directly plicable to the research situation and a more positive program is needed to encourage reasonable joint R&D ventures to proceed. Where they appear "OK", but the Government does not wish to give a permanent blessing, at a minimum protection from severe penalties is required if the Government later decides to attack them.

3. As applied to R&D, the penalties for misjudging the law are excessive

Treble damages as an appropriate remedy for antitrust violations have been subject to much recent discussion. Our comments will be limited to them as applicable to research and development activity.

First, let us clarify one point. The penalty deters a lot of legal activity, not just illegal activity. Put properly, we should say that the penalty of treble damages tends to deter any activity which we cannot now predict will be held legal. It is an argument against engaging in any activity which is not clearly enough legal so that we will not have to spend years in court and hundreds of thousands of dollars defending it. As to agreements about prices this may be a sound policy. As to R&D activity in today's circumstances, it surely is not.

Another point needs emphasis. These penalties are assessed against the defendant who loses, whereas no comparable penalty is assessed against plaintiffs who lose. After years of litigation they may fail to show any violation by the defendant. Nevertheless, they have inflicted on those innocent defendants huge court costs and attorneys' fees plus years of unlimited file searching, depositions and court hearings. We note the Washington Post editorial last year reporting an award of $40 million for attorneys' fees in a recent case.

An entire industry has been established on the basis of these penalty provisions. It consists of attorneys, economists, data processors and various experts. Also, it necessarily includes the many state and federal courts where tions, hearings and trials can cover 10 to 20 years on a single case. We have already been told by participants in the industry that certain important high technology R&D ventures will be their target. That is fair enough if that target engages in anti-competitive behavior against the public interest. If there is a real violation, and some real damage to someone, recovery is proper, and that will be incentive enough to induce a lawsuit. In determining whether treble damages are desirable in every circumstance, however, the question of justification should be examined. All should concede that if the purpose is a penalty - punishment - it should not be assessed in all cases.Where the applicable antitrust rules were clearly doubtful and difficult to ascertain at the time the venture was instituted, massive penalties cannot be justified.

It is said, however, that the purpose of treble damages is to encourage so called "private attorney generals" to enforce the law. If so, the Congress should perhaps determine whether that purpose is served where, as often occurs, the private plaintiff relies almost wholly upon U.S. government action. In other words, the plaintiff often brings a lawsuit only after a government action has been brought, and filing of the plaintiff's suit serves to toll the statute of limitations. The plaintiff then waits to see if the government wins and, if so, the plaintiff then proceeds against the defendant with respect to the issue of damages. Even where little or no damages are awarded, huge attorneys fees may be paid to plaintiff's attorneys. The so called purpose of the treble damage penalty plus the attorneys' fee award cannot really apply in such cases, since the plaintiff really was not the initiator of the original action. As to R&D at least, where the applicable rules are unclear and encouragement of the activity is desirable from a public policy viewpoint, such a penalty and such a reward to intiff's lawyers seems misplaced.

Proposals for Amendment

We support amendment of current antitrust laws to encourage R&D efforts. We commend the efforts of all the various members of the Congress who have introduced or supported Bills to this end.

We have examined most of these Bills. We have joined some other companies attempting to reach some concensus on the needs and the remedies. In doing so, we have attempted to incorporate ideas from many of the prior Bills, as well to reflect some concepts expressed by former Assistant Attorney General Baxter.

However, we do not believe the S.1841 as introduced goes nearly far enough. Therefore, we support the efforts of the Ch airman and this Committee to deal with this urgent issue.

We urge for your consideration a revised proposal which has been circulated for comment within industry and has received widespread support. We are making it available to the Committee staff. Although we think this proposal is the best yet presented, we do not insist that it necessarily should be the final legislation. However, we urge specifically that provisions should be enacted which cover the three problems we have already mentioned.

Conclusion

On behalf of my company, and all the other companies and groups which are seeking remedies for the current situation, we thank the Chairman, this Committee, and the entire Congress for addressing this crucial issue.

PREPARED STATEMENT OF STEVEN J. OLSON, ASSOCIATE GENERAL COUNSEL, CONTROL DATA CORPORATION

Mr. Chairman and Members of the Committee:

My name is Steven J. Olson, Associate General Counsel of Control Data Corporation -- which is headquartered in Minneapolis, Minnesota. I want to thank you for the opportunity to appear here today. Control Data has long held the view that one solution to our nation's most pressing needs is an increase in cooperation among all constituencies of our society. Specifically in the area of research and development, Control Data is and has been a participant in several joint ventures -- a prominent example being the Microelectronics and Computer Technology Corporation (or "MCC"), which Control Data's Chairman and President conceived and in which to date fourteen U. S. companies have joined together to explore the semiconductor and computer technologies of the 1990's (and beyond). As you may know, MCC has chosen to locate in Austin, Texas, and is headed by Admiral (Ret.) Bobby Ray Inman.

The need for cooperation in R and D is well recognized. As technologies have advanced, the costs of each subsequent step has increased exponentially -- both in terms of capital and manpower. Moreover, the risks -- always high -- have mushroomed, because the number of technological options in any discipline is so large that no single firm can effectively explore them all. But while the demand for capital and manpower resources has thus exploded, the supply -- in both areas -- has not kept pace. And while individual American firms have struggled with these limitations, our foreign competitors have been the beneficiaries of government-coordinated efforts, the aims of which are future world domination of key markets.

For almost two years now, the debate has been raging as to whether the U. S. antitrust laws deter American firms from responding to these challenges by cooperating in R and D and, if so, what changes should be made in our antitrust law to eliminate this deterrence. A great deal of testimony has been taken, and study done, by various Congressional committees. I think it fair to say that even among those who believe that our antitrust laws *do not* -- or at least under reasonable application *should not* -- inhibit cooperation in R and D, there is general agreement that many business executives *perceive* such laws as significant barriers to joint research. They thus shy-away from such activities -- and, over the long haul, our country is the loser. I know this from first hand experience with the formation of MCC.

So what can -- or should -- Congress do about this. To date, bills introduced to address this need number in the teens -- and they embody several approaches. One of the first was S. 737, introduced by Senator Mathias and cosponsored by Senators Specter, Baucus, Chafee and Hart. From the outset, Control Data has strongly supported the philosophy and *approach* reflected in S. 737. That Bill, and several subsequent Bills, recognized that what business executives and their lawyers need is *clarity* and *certainty* -- assurance that if they behave in a prescribed manner, their R and D cooperation will not be subject to distant-future second-guessing by ever-rotating public agencies or federal judges applying "flexible" legal standards and 20-20 hindsight. S. 737 (and similar Bills) do that by defining, up-front, the standards of conduct that, if met, will result in a *per se* legal R and D venture.

Critics of this approach make two broad arguments. First, some contend that whatever the standards of conduct embodied is such a bill may be, they may be more restrictive than is really necessary in some situations, *or*, in other situations, their application may still be ambiguous. To meet such criticisms, one proposal -- the so-called "negative clearance" approach -- would allow potential venturers that want to engage in activities inconsistent with the standards (or who are in doubt as to their application) to disclose their plans to the FTC and Justice Department; in turn, unless and until advised to the contrary, such venturers could proceed with a sense of certainty that their activities were also in compliance with law. This approach also makes sense.

The second criticism of attempts to clarify the law is the contention -- by, for example, the Justice Department, among others -- that it is impossible to draft a set of criteria that will inevitably be pro-competitive, and that the law must thus remain flexible (as it presently is) to allow the agencies and courts to address unique situations and circumstances that will inevitably arise. Thus rather than clarifying the substantive antitrust law as it relates to joint R and D, they would leave that essentially intact and simply modify the penalties that would be applicable in the event of a violation -- as by allowing single (or actual) as opposed to treble damages.

It may be that this back-door approach would, by itself, encourage more joint R and D -- but I doubt it. First, it provides neither certainty nor clarity to venturers -- a cynic might say that the espoused desire to retain flexibility in the application of the antitrust laws is in fact a fear of losing the right to be arbitrary (which is, in fact, what business executives fear).

Beyond this, however, simply reaffirming a "rule of reason" approach to joint research is too timid -- it really says that "if we can't correct an ambiguous law perfectly, let's do nothing." But that essentially ignores the need to encourage cooperation; it overemphasizes the competitive dangers from joint research -- we're not talking about joint production, [illegible]uring or joint marketing or even joint product development, but (as the Rodino bill makes clear in the exclusions from its definition of R and D) defined activities well-removed from the marketplace; nor are we talking about merging companies, but rather limited cooperation that could make mergers unnecessary. Finally, the "rule of reason" approach fails to recognize that the potential consequences of an over-encouragement of cooperative research are far more easily corrected than the potential consequences of failing to encourage such activities -- Congress can alone modify the antitrust laws; it most certainly cannot itself recapture lost markets and the dollars and jobs they generate.

Thus, Congress should place the priority of antitrust clarification ahead of the priority of damage relief. Clarifying what constitutes lawful cooperative research meets the problem head on; and expections of "perfection" in such a task are misplaced.

If nonetheless, Congress should choose to gamble with a less direct approach, I would suggest that -- in addition to addressing the questions of private antitrust remedies and attorneys' fees -- at a minimum, any restatement of the "rule of reason" as applied to joint research should elaborate on those competitive effects that should be the primary focus of agency or judicial inquiry in that context. This should be specifically covered in the statute, rather than non-binding report language. For example, in any given instance of cooperation, if the evidence shows:

> one, that on a worldwide basis, other viable research efforts in comparable fields exist or are likely to be undertaken
>
> and
>
> two, that provision has been made to not unreasonably deny access to the the fruits of the venture by others,

the likelihood of injury, under any realistic hypothesis, to either the competitive process or consumers would be virtually non-existent.

Thank you, Mr. Chairman, for the opportunity to appear here today. I would be pleased to respond to any questions.

The **CHAIRMAN**. We thank you both for your appearance here and the contribution you made to this hearing. You are now excused.

Mr. **CREIGHTON**. Thank you very much.

Mr. **OLSON**. Thank you, Mr. Chairman.

The **CHAIRMAN**. The hearing is adjourned.

[Whereupon, at 4:05 p.m., the committee was adjourned.]

APPENDIX

NATIONAL SCIENCE FOUNDATION
Washington, DC 20550

March 12, 1984

STATEMENT OF

CHARLES H. HERZ
GENERAL COUNSEL

SUBMITTED TO THE COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

The National Science Foundation wishes to express its strong support for S. 1841 as it would read after amendment as proposed by the Chairman of this Committee. On October 26, 1983, I testified before the Committee and explained why the NSF favored S. 1841 as originally submitted. We recognize the realities that have led the Committee to postpone further consideration of Titles III through V, though we hope it will be possible for you to take up those proposals again before long.

The proposed amendment to S. 1841 would meet the concerns that led to NSF support for Title II of the original bill at least equally well. We would make five main points that may bear on your consideration of the amendment:

1. Current trends in science and technology suggest that research and development joint ventures may become more important to U.S. technological advance and economic competitiveness.

2. Antitrust anxiety, whether or not based on exaggerated fears, has been a significant factor in restraining formation of such joint ventures in this country.

3. What is most needed to counter that anxiety is a clear signal to businessmen and their lawyers of relative Government favor for procompetitive R&D joint ventures.

4. Legislation to serve this purpose should make clear that R&D joint ventures will be considered on their

economic merits and should remove the threat of "strike suits" against such ventures.

5. Such legislation should not impose detailed requirements on the forms R&D joint ventures should assume or the activities they may undertake. Nor should it force the Justice Department to act as a regulatory agency, likely to similar effect.

1. Trends in Science and Technology

Increasing costs of research and heightened international competition in technology are elevating the potential importance of R&D joint ventures.

Scientific advances and technological developments, as members of the Committee well know, are proceeding at an extraordinary pace. Possibly the single most important contribution to those advances and developments has come from the vastly increased power of scientific instruments and techniques. But many of the instruments to which I refer -- supercomputers, synchrotron light sources, nuclear magnetic resonance spectrometers, lasers, and many others -- become many times more costly even as they become many orders of magnitude more powerful. The cost of such instruments means that they often can be used economically only where there is a critical mass of scientists and engineers to share them. Moreover, the techniques for effectively using them often require scarce specialized expertise and larger teams of scientists. Rapidly advancing fields of science and technology, particularly multidisciplinary ones, also increasingly require larger teams of scientists and engineers. All these trends mean that in several areas state-of-the-art laboratories or research and development projects may be difficult for even the largest companies, let alone the smaller ones, to support on their own. One obvious solution is the R&D joint venture.

Meanwhile, American industry is increasingly involved in international technological competition. In microelectronics, in computers, in aircraft, in biotechnology, in many other fields, competitors overseas have pooled their technological resources. American companies may be better able to keep ahead or abreast if they do the same.

Does this mean that R&D joint ventures will soon multiply, at least if freed from antitrust constraint? Not necessarily. There are other barriers to joint R&D. Firms may fear to surrender a competitive edge by sharing proprietary information or by forgoing the chance of achieving breakthroughs on their own. Firms that are already strong in R&D seem particularly concerned that an R&D joint venture will give weaker competitors a free ride. R&D executives may dislike losing full control of their research dollars. Probably no one now knows whether these barriers can (or should) often be overcome.

We are convinced, however, that the wise course is to take a further step to free businessmen from antitrust anxiety and so allow them to consider joint ventures on the economic merits.

2. Antitrust Anxiety

A common argument against the proposed legislation is that businessmen have nothing to fear. Perhaps not. Though precedent is sparse in this area (partly because antitrust fears allowed few R&D joint ventures to proceed), the most recent decision does employ the rule of reason. Moreover, the Antitrust Guide Concerning Research Joint Ventures displays a very reasonable Justice Department attitude toward such ventures. Nonetheless, antitrust anxiety persists.

That even sophisticated companies and their lawyers remain concerned is evidenced by the strong interest in this bill displayed by those who have recently formed or are thinking of forming R&D joint ventures. Our impression is that the level of antitrust concern is even higher among less knowledgeable businessmen and lawyers and may have nipped many a notion for joint R&D in the bud. We worry that this phenomenon may be most common in small to mid-sized companies where joint R&D might be most economically beneficial and might contribute most to US competitiveness. At a recent meeting I attended concerning the competitive status of a highly disaggregated industry, for example, the dynamic of conservative opinions from corpoate counsel confusing and discouraging corporate officers from seriously considering joint R&D -- despite the assurances of outside attorneys now or recently in the Antitrust Division -- was patent.

In short, Chairman Rodino may well be right that "the perception is more important than the reality". In any event the perception is sometimes a powerful one.

3. The Need for a Signal

We are convinced that this perception will dissipate only very slowly without a clear signal from the Congress. We are not convinced that such a signal requires extensive writing of new legal standards or removal of all legal uncertainty, which is rarely accomplished anyway. Businessmen do live with some uncertainty under the antitrust laws and other laws every day.

Needed is a clear indication to the courts, and hence to lawyers and their clients, that R&D joint ventures should be regarded differently from disfavored forms of collective economic activity -- that they are more likely to be procompetitive than other forms of concerted action by competitors. For reasons we and others have articulated to the Committee in earlier testimony, it seems clear that this is indeed the case.

In our experience the symbolic effects could be more important even than the actual legal changes. A few years ago, for example, this Committee was instrumental in passing the Bayh-Dole Act, which provided that universities and small businesses were to receive rights in inventions developed in the course of Federally supported research. At the NSF and most other agencies this changed existing practice very little, if at all. Yet the change in perceptions that ensued was remarkable. Businessmen who "knew" that the Government always took contractor patents suddenly became willing to consider dealings with the Government and with university researchers that before they would have thought out of the question.

The effect of this legislation might be similar. Relatively modest changes in the law could importantly alter perceptions to the benefit of U.S. science and technology.

4. Ingredients of an Effective Signal

The proposed legislation would make the right modest changes.

First, it would make clear that R&D joint ventures should be judged on their economic merits, not under a *per se* rule. For reasons given in earlier testimony, and now almost universally accepted, that is the right standard for judging such ventures in any case.

Second, it would largely remove two major threats -- the threat of damages disproportionate to the likely benefits from joint research and the threat of an antitrust "strike suit" (though not of a suit by a competitor who felt seriously injured competitively). It would accomplish those reassuring changes by eliminating treble damages. Whatever their merits as stimulants to "private antitrust enforcement" in other areas, treble damages seem overkill here. R&D joint ventures, particularly when they are disclosed to the Government in advance, present little risk of anticompetitive effect, hence little need for private enforcement.

5. Fixed Formats or Precertification

Some are still seeking yet more freedom from antitrust uncertainty. They want complete immunity from antitrust liability if a joint venture meets specific requirements concerning entry, structure, licensing, and the like or, in other versions, if the Antitrust Division precertifies the venture as free of antitrust fault. We think further immunity on either basis is unnecessary; it may also be unwise.

The specific requirements of a "safe harbor" format would not reduce all uncertainty, but transfer it to new and undefined terms as yet untested in the courts. Worse, they could force R&D joint ventures into rigid molds, excluding other formats that could prove more productive and procompetitive in particular settings. We would particularly question any requirement that immunized joint ventures must be open to all who might want entry or that they must license all resulting technology to nonparticipants who have not shared the inherent risks of economic failure.

Precertification, besides forcing Justice into an unwelcome regulatory role for which it is ill suited, would likely force it into an unwarrantedly cautious style. Justice attorneys would surely require detailed information on how the joint venture will proceed, notwithstanding that research is inherently unpredictable, and might condition any certificate on detailed assurances. The venture could end up tailored to satisfy the new Federal regulators and troubled by new uncertainties about whether all the conditions and assurances are being satisfied.

Neither result would serve the intended purposes of this legislation.

* * * * * * *

For these reasons we hope you will adopt the amendment to S. 1841 proposed by the Chairman and report the amended legislation favorably to the Senate. We should like to express our gratitude to the Committee both for the opportunity to express our views and for taking up this important and timely subject.

THE UNIVERSITY OF GEORGIA

SCHOOL OF LAW

ATHENS, GEORGIA 30602

March 12, 1984

Hon. Strom Thurmond, Chairman
Senate Judiciary Committee
Room 224, Dirksen Senate Office Bldg., N.E.
Washington, D.C. 20510

RE: S. 1841, H.R. 3878: The National *Productivity and Innovation Act of 1983*.

Dear Senator Thurmond:

I have been invited to testify before the Judiciary Committee today, Monday, March 12, concerning the above proposed legislation. I regret that I am unable to attend today's hearing, for the legislation under consideration, which in my view would not achieve its intended result and would be seriously counterproductive, deserves further attention and more informed debate.

As an alternative to oral testimony, please include the following observations, which can be expanded upon request, in the record of the Committee's hearing. My views are based upon my experience as a researcher, teacher, and consultant in antitrust and corporate law at the University of Georgia Law School, as an antitrust litigator for the U.S. Department of Justice, and as a corporate lawyer in private practice in New York City. In particular, I have given substantial attention to the treble-damages remedy in private antitrust litigation in the context of proposed legislation (which I favor) regarding contribution and claims reduction. See, *e.g.*, Ponsoldt, "Contribution In Antitrust Litigation: The Emerging Consensus in Legal Literature," 38 Washington and Lee Law Review 315 (1981).

As a general matter, the above proposed legislation (S. 1841), which in relevant part would eliminate the treble damages remedy for persons injured by illegal anticompetitive conduct "that is part of a research and development program," is the wrong, even if well-intentioned, response by Congress to a national problem: the lagging competitiveness of American business. Moreover, the vast majority of persons who sponsor this legislation in good faith may be pursuing the cause of a few who wish to engage in cartel-activities with minimal risk, to the detriment of the public interest in a competitive economy.

I wish to make three points, based upon substantial research, thought, and practical antitrust experience: 1. the existing treble damages remedy is *not* a serious deterrent to businessmen wishing to engage in *legitimately* pro-competitive research and development joint ventures, and so the elimination of treble damages would not encourage joint venture innovation or stimulate exports; 2. on the other hand, the continuation of the treble-damages remedy is essential to deter and police cartel activites, including agreements to reduce output and capacity which increase domestic price control power and which may hide behind the "joint venture" characterization; 3. American business is becoming less competitive in international markets, resulting in a growing foreign trade deficit, *not* primarily because American products are insufficiently innovative or advanced but because American products (and labor) are relatively too expensive for foreign consumption. The answer is to increase competition, not cooperation, within domestic markets.

In other words, the elimination of treble damages liability for conduct which is characterized as part of a joint research and development venture but is nevertheless anticompetitive and output restricting would not be a logical or useful approach to achieve increased research and development; it simply would not achieve the desired result. Such an approach, moreover, could prove dangerously counterproductive, perceived as an invitation to cartel formation, and could prove destructive to antitrust policing which is necessary to competitively healthy domestic markets. Finally, regardless of whether the elimination of treble damages would lead to increased joint venture activity, the promotion of cooperative activity among domestic competitors in most cases would not, in the long term, enhance the international competitiveness of American business. Only by assuring the strength and efficiency of domestic markets as a whole, rather than the institutionalization of particular business and its labor constituency, can we overcome the cost advantages of foreign competitors.

The concept that we best assure long-term international competitiveness by promoting domestic cooperation among private business or with government has been proved false many times in this century. Central to the distinction between free market and socialist economies is, on one hand, the process of competition among a diversity of economic voices continuously weeding out the efficient from the inefficient, versus, on the other hand, the cooperative protection of existing entities, whether private or public.

1. Antitrust law regarding output-enhancing research and development joint ventures is well-established: such joint ventures never have been held to violate the Sherman Act. Anyone who suggests ambiguity or confusion regarding the legality of pure R. and D. joint ventures simply is not well-informed or is dissembling. The existence of the Business Review procedure within the Justice Department, by which persons desiring advice concerning the legality of proposed conduct may obtain such advice and clearance from the Department, has reinforced the ability of well-intentioned businessmen to insure that their conduct remains within legal limits. R. and D. joint venture agreements are detailed in specific written agreements among the participants concerning their mutual undertakings and expectations. Such agreements normally are drafted with the advice of an antitrust attorney. If the participants limit their combination to the terms of the agreement, they have no valid antitrust fear. While no legislation, certainly not that proposed, can completely eliminate the fear of groundless litigation designed to coerce settlements, knowledge of clearly established precedent interpreting the Sherman Act since 1911 should minimize any real fear on the part of the business community. Of course, any person facing theoretical treble-damages liability who can persuade Congress to eliminate that theoretical problem will seek such relief; if Congress responds favorably to that pressure, it will not serve its asserted purpose.

2. Historically, many "joint ventures" have become vehicles for agreements among competitors to divide markets, fix prices, or reduce output. Such extralegal conduct is normally not contemplated by a written agreement and is a valid subject for antitrust challenge. It is important that Congress not take any step to encourage businessmen to further eliminate "destructive competition" among themselves in order to stabilize prices and increase profitability. I assume that this legislation is not designed to protect cartels, yet creative defense lawyers easily could rely upon the language of the proposed legislation to argue that joint activities emanating from a legitimate R. and D. venture which extended to output restrictions and price control should be characterized as part of the joint venture and should be immune from treble-damages liability.

Many economists maintain that American businessmen are "risk averse" and would simply regard a single damages judgment as a cost of doing business to be passed on to the consumer -- and as a reasonable risk for engaging in cartel activities under the "joint venture" umbrella. See, e.g., Elzinga & Breit, "The Antitrust Penalties: A Study In Law and Economics 120-127 (1976).

Central to our free market economy is active enforcement of the Sherman Act, both by the government and by private parties. The treble-damages remedy has long been recognized as necessary to deter Sherman Act violations and to promote private enforcement of the law.

The legislative history of the Sherman Act offers clear evidence that the Congress' decision to provide for treble damages was a conscious and reasoned choice. The first draft of the Act, presented to the Senate on August 14, 1888, called for double damages. S. 3445, 50th Cong., 1st Sess. (1888). The bill was introduced by Senator Sherman and subsequently referred to the Committee on Finance. In the Committee's report to the full Senate on September 11, 1888, the provision for a civil remedy was given its own section (§ 2), and only compensatory, or single damages, was called for. The subject of antitrust legislation was not taken up by the Senate again until December 4, 1889, when Senator Sherman's bill, as reported by the Committee, was reintroduced. S. 1, 51 st Cong., 1st Sess. (1889). The bill was again referred to the Committee on Finance, but with different results. The Committee reversed itself and changed § 2 to provide for double damages, in effect returning to the language of Senator Sherman's original proposal. The Senate took no action on the bill; instead, it was referred to the Judiciary Committee, generally recognized as antagonistic toward antitrust legislation, by a floor vote of 31 to 28. 21 CONG. REC. 2610 (1890)(remarks of Sen. Vance). To the surprise of all concerned, the bill was reported to the Senate floor on April 2, 1890 with substantial changes. The provision for a private cause of action, which was changed to § 7, called for treble damages. This version remained unchanged and was enacted into law. See 1 The Legislative History of the Federal Antitrust Laws and Related Statutes 12-60, 63-277 (E. Kintner ed. 1978).

The Senate thus did not carelessly impose an arbitrary amount of damages. Treble damages are extraordinary, and the progressive changes in Senator Sherman's bill indicate that they were chosen only after lengthy deliberation. They have remained the Cornerstone to the deterrence of cartels and to private enforcement of the Act since that time.

3. The importance of private Sherman Act enforcement leads to the third point summarized above. Putting aside the recognition that the elimination of treble damages is irrelevant to the promotion of joint ventures, it is also apparent that, with few exceptions (including some capital intensive new technology markets), promoting or encouraging joint ventures will hurt, not help, the competitiveness of American business.

Research demonstrates, for example, that smaller, single firms produce more patents per dollar investment than larger, bureaucratized institutions. Cooperation in research and development might be less risky for the cooperating businesses but is more dangerous and less productive for the economy at large. To a large extent, American products have difficulty competing today in foreign markets because they are too expensive; they are too expensive because American firms (and labor) have avoided through merger and government protection the kinds of domestic competition that would force efficiencies and innovation or bankruptcy.

Promotion of joint ventures, rather than reliance upon the competitive development of new products, while providing a risk-spreading device for American business, will not succeed in forcing efficiencies and true innovation that exist primarily in smaller, emerging Hi-Tech corporations.

In short, we cannot enhance the international competitiveness of American business by allowing the reduction of competition in domestic markets, as occurred during the 1950's and 1960's in the steel and automobile industries. And yet such is the premise of this and other legislation sponsored by the current administration and our private business community. American businessmen seek "cooperation" in its various forms rather than competition because only through cooperation leading to mutual reductions in output, acquisitions of competitors, divisions of markets -- can particular business effect sustained, excessive profitability. And it is precisely sustained, excessive profitability which businessmen, spurred by the demands of the financial and securities communities, quite rightly perceive as their goal.

In other words, the goals of private businessmen, viewed independently, are not necessarily consistent with a competitive free market, particularly in a climate of static or uncertain demand. It is the function of the free market, policed to a limited extent by government and private antitrust enforcement, to assure that American business remains efficient and innovative and that the American public shares in the benefits of increased productivity.

An efficient, competitive domestic market, not protected, cooperative, institutionalized business, is the best antidote to foreign competition.

In summary, the existence of treble-damages cannot and does not deter legitimate R. & D. joint ventures which are not designed to reduce capacity and fix price. Rather than the proposed legislation, movement on the pending contribution/claims reduction legislation would be a more reasonable, equitable way to reduce potential liability to business for unintended antitrust violations. On the other hand, continuation of the treble-damages remedy without exceptions or immunities is essential to deter and allow private enforcement of cartel activities. And, finally, government promotion of joint R. & D. in most forms is more likely to reduce, not increase, the competitiveness of American business. The proposed legislation should be tabled for further study.

Respectfully submitted,

James F. Ponsoldt

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JFP:skk

cc: Hon. Peter Rodino

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March 13, 1984

Honorable Strom Thurmond
Chairman, Committee on the Judiciary
SD 224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Research and Development Joint Ventures

Dear Senator Thurmond:

I want to express my opposition to the Bill now before the committee that would eliminate treble damages and provide attorneys fee awards for successful defendants in private antitrust cases arising out of research and development joint ventures.

An economically sound antitrust policy is vitally important to American interests, especially as it affects American interests in international trade. In respect of joint ventures generally, and certainly with respect to R & D ventures, these laws are today just about where they ought to be. In any respect in which these laws impair the interests of American consumers they should be changed; but where they fully protect American consumers we should resist any impulse to do fine tuning. We should be guided by the conservative adage, "If it's not broken, don't fix it."

There are several kinds of R & D ventures that should be encouraged: those that bring relatively small firms together to engage in activities none could manage alone; those that bring together complimentary talents or information that could not be replicated without a multi-firm partnership; those that enable activities at a scale or entailing risks too great for even large firms in an industry to undertake alone. But there are also ventures that should be discouraged: those where firms with a large market share increase their market power and exclude or discourage innovation or even entry by others (Berkey Photo, Inc. v. Eastman Kodak Co., 603F 2d 263, (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980) (Kodak-GE venture)); those that contain collateral restrictions (such as express or implicit price fixing or market division) which are not necessary to facilitate research and do significant injury to competition; and those that bring together the dominant firms and that tend to make access to the venture a prerequisite to success, yet arbitrarily exclude some firms.

Current law, as expressed in the Department of Justice --Research Joint Venture Guidelines (November, 1980), and as expressed in the case law and the secondary literature is a very effective screen. It serves to admit all of the venture in the first category and excludes only those in the second category. And the categories are remarkably clear--as clear as one could hope to find in law regulating economic activity.

Thus, to change the incentive system established under present law would be both unnecessary and risky. Change is unnecessary, because economically sound ventures are lawful already and courts, enforcement agencies and lawyers giving advice to ventures all know that they are lawful. Indeed, despite all the talk about R & D ventures in governmental, legal and industrial circles, I have yet to hear of a single instance in which a venture limited to R & D that anyone seriously argues would be economically useful has been detered by antitrust concerns. Change like that in this bill would also be risky, because the drastic reduction in incentives to challenge economically harmful ventures--indeed, the creation of a distinct and powerful disincentive to do so--would embolden those ready to stifle competition in their own interest.

Remember, it is rare indeed that the mere creation of a venture to do R & D creates any antitrust issue. As a practical matter the problems come with respect to collateral restraints, and with respect to access to the venture or to its output on reasonable terms. It is here, in these kinds of particulars, that antitrust has an important role to play. Such particulars and their consequences are likely to be visible to non-venture firms in the same industry, or to customers or suppliers of venturers; but such particulars will not be very visible to enforcement agencies or oversight committees. The present law obliges those putting ventures together to have an eye to the public interest and, as it were, to turn square corners. Under present law venturers know that they can be seen and called to account. But if this bill became law we could not expect venturers of the future to show the same sensitivity to the national interest that the present law requires.

Very truly yours,

Lawrence A. Sullivan

Lawrence A. Sullivan
Earl Warren Professor
of Public Law

LAS:jd

c: Senator Howard Metzenbaum

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